DOCKET

No. 08-7621
Title: Joe Harris Sullivan, Petitioner
v.
Florida
Docketed: December 11, 2008
Lower Ct: District Court of Appeal of Florida, First District
Case Nos.: (1D07-6433)
Decision Date: June 17, 2008
Rehearing Denied: August 6, 2008
Questions Presented

Date	Proceedings and Orders
Oct 20 2008	Application (08A358) to extend the time to file a petition for a writ of certiorari from November 4, 2008 to December 4, 2008, submitted to Justice Thomas.
Oct 22 2008	Application (08A358) granted by Justice Thomas extending the time to file until December 4, 2008.
Dec 4 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 12, 2009)
Dec 23 2008	Waiver of right of respondent Florida to respond filed.
Jan 15 2009	DISTRIBUTED for Conference of February 20, 2009.
Jan 21 2009	Response Requested . (Due February 20, 2009)
Feb 26 2009	Order extending time to file response to petition to and including March 23, 2009.
Mar 20 2009	Brief of respondent Florida in opposition filed.
Mar 30 2009	Reply of petitioner Joe Harris Sullivan filed.
Apr 2 2009	DISTRIBUTED for Conference of April 17, 2009.
Apr 20 2009	DISTRIBUTED for Conference of April 24, 2009.
Apr 27 2009	DISTRIBUTED for Conference of May 1, 2009.
May 4 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 3 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 16, 2009.
Jun 3 2009	The time within which to file respondent's brief on the merits is extended to and including September 14, 2009.
Jul 7 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent. VIDED.
Jul 15 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 16 2009	Joint appendix filed. (Statement of costs filed)
Jul 16 2009	Brief of petitioner Joe Harris Sullivan filed.
Jul 22 2009	Brief amici curiae of Amnesty International, et al. filed. VIDED.
Jul 23 2009	Brief amicus curiae of Disability Rights Center filed. VIDED.
Jul 23 2009	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED.
Jul 23 2009	Brief amicus curiae of American Bar Association filed. VIDED.
Jul 23 2009	Brief amici curiae of Former Juvenile Offenders Charles S. Dutton, et al. filed. VIDED.

Jul 23 2009	Brief amicus curiae of The Sentencing Project filed. VIDED.
Jul 23 2009	Brief amici curiae of Educators, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of American Association of Jewish Lawyers and Jurists, et al. filed. VIDED.
Jul 23 2009	Brief amicus curiae of Center on the Administration of Criminal Law filed. VIDED.
Jul 23 2009	Brief amici curiae of Juvenile Correctional Administrators, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of Mothers Against Murderers, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of J. Lawrence Aber, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of American Psychological Association, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of American Medical Association, et al. in support of neither party filed. VIDED.
Jul 23 2009	Brief amici curiae of Juvenile Law Center, et al. filed. VIDED.
Aug 17 2009	SET FOR ARGUMENT ON Monday, November 9, 2009
Aug 17 2009	CIRCULATED.
Sep 10 2009	Record received from Circuit Court of Escambia County, Florida (1 envelope).
Sep 10 2009	Record received from the Court of Appeals of Florida, 1st District.
Sep 14 2009	Brief of respondent Florida filed. (Distributed).
Sep 18 2009	Brief amici curiae of Solidarity Center for Law and Justice, P.C., et al. filed. VIDED. (Distributed)
Sep 21 2009	Brief amicus curiae of Center for Constitutional Jurisprudence filed. VIDED. (Distributed)
Sep 21 2009	Brief amici curiae of Sixteen Members of the United States House of Representatives filed. VIDED. (Distributed)
Sep 21 2009	Brief amicus curiae of National District Attorneys Association filed. VIDED. (Distributed)
Sep 21 2009	Brief amici curiae of National Organization of Victims of Juvenile Lifers, et al. filed. VIDED. (Distributed)
Sep 21 2009	Brief amici curiae of Louisiana, et al. filed. VIDED. (Distributed)
Sep 21 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED. (Distributed)
Oct 14 2009	Reply of petitioner Joe Harris Sullivan filed. (Distributed)
Nov 9 2009	Argued. For petitioner: Bryan Stevenson, Montgomery, Ala. For respondent: Scott D. Makar, Solicitor General, Tallahassee, Fla.

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PETITION FOR WRIT OF CERTIORARI

(27)

08-7621

IN THE SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN, Petitioner,

v.

STATE OF FLORIDA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

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December 4, 2008

QUESTIONS PRESENTED

Joe Sullivan is serving a sentence of life imprisonment without the possibility of parole for a non-homicide offense committed when he was thirteen years old. Nationwide, only one other thirteen-year-old child has received a life-without-parole sentence for a non-homicide. The questions presented are:

1. Does imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide violate the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children?

2. Given the extreme rarity of a life imprisonment without parole sentence imposed on a 13-year-old child for a non-homicide and the unavailability of substantive review in any other federal court, should this Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

A. Rarity of Death-in-Prison Sentences for Thirteen-Year-Olds. 2

B. Joe Sullivan's Background, Offense, and Conviction. 5

C. Procedural History of Judgment on Review in This Petition. 6

D. The State Court Ruling on Review. 7

REASONS FOR GRANTING THE WRIT 9

I. JOE SULLIVAN'S EIGHTH AMENDMENT CLAIM SHOULD BE REVIEWED ON THE MERITS, AND A WRIT OF CERTIORARI FROM THIS COURT PROVIDES THE ONLY MEANINGFUL OPPORTUNITY FOR SUCH REVIEW. 10

A. If This Court Does Not Review Joe Sullivan's Claim Now, a Novel and Important Constitutional Question Will Go Unreviewed. 10

B. This Court Should Review Joe Sullivan's Claim on the Merits Now Because the Complete Basis for That Claim Emerged Only Over Time. 12

i. Joe Sullivan should have access to evolved societal and legal values concerning the culpability of children and juveniles. 13

ii. The unusual and cruel character of Joe Sullivan's sentence has become clear with the passage of time. 15

C. This Court Should Take Jurisdiction Because the State Court's Ruling Is Based On a Threshold Determination of Federal Constitutional Law. 18

II. A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED ON A THIRTEEN-YEAR-OLD CHILD FOR A NON-HOMICIDE VIOLATES THE PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. 19

A. The Principles Recognized in Roper v. Simmons Compel the Conclusion That the Constitution Prohibits Sentencing a Thirteen-Year-Old Child to Die in Prison for a Non-Homicide. 20

B. The Law Recognizes the Critical Difference Between Thirteen-Year-Old Children and Older Adolescents. 21

C. The Extreme Rarity of Sentencing a Thirteen-Year-Old to Die in Prison Shows that Such a Sentence Is Cruel and Unusual in Violation of the Eighth Amendment. 24

D. Scientific Research Establishes that Young Teens are Psychosocially and Neurologically Different from Older Teens in Constitutionally Relevant Ways. 29

CONCLUSION 32

APPENDIX A Florida Court of Appeals, First District, Order denying rehearing, rehearing en banc, and certification to the Supreme Court of Florida (Aug. 6, 2008).

APPENDIX B Florida Court of Appeals, First District, Summary affirmance (June 17, 2008).

APPENDIX C Circuit Court of Florida, First Judicial Circuit in and for Escambia County, Order and judgment (Oct. 31, 2007).

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Floyd v. State, 808 So. 2d 175 (Fla. 1992) 4

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28 U.S.C. § 2244 11

29 U.S.C. §§ 203, 212, 213 23

Cal. Penal Code § 190.5 27

Colo. Rev. Stat § 17-22.5-104 27

D.C. Code § 22-2104 27

1995 Fla. Laws ch.95-294, § 4 (eff. Oct. 1, 1995) 8

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PETITION FOR WRIT OF CERTIORARI

Joe Sullivan respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida for the First District.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida for the First District is reported at 987 So. 2d 83 (Table) and is attached as Appendix B. That court's denial of rehearing, rehearing en banc and certification to the Supreme Court of Florida is unreported and is attached as Appendix A. The order and judgment of the Circuit Court of Florida for the First Judicial Circuit is unreported and is attached as Appendix C.

JURISDICTION

The judgment of the District Court of Appeal of Florida was entered June 17, 2008. On August 6, 2008, that court denied a timely motion for rehearing, rehearing en banc, and certification to the Supreme Court of Florida. Because the district court of appeal affirmed without opinion, Florida law did not permit further review. Jackson v. State, 926 So. 2d 1262, 1265 (Fla. 2006). On October 22, 2008, Justice Thomas extended to and including December 4, 2008 the time for filing this petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents a question of great importance concerning the constitutionality of condemning a thirteen-year-old child to die in prison. Petitioner Joe Sullivan is one of only two people in the United States to have been sentenced to die in prison for a non-homicide offense committed at the age of thirteen, and one of only eight thirteen-year-olds to receive that sentence for any crime.[1] In the vast majority of states, no one Joe's age has received a life-without-parole sentence.

A. Rarity of Death-in-Prison Sentences for Thirteen-Year-Olds

Nationwide, Joe Sullivan is one of only two thirteen-year-old children who have received life-without-parole sentences for crimes in which the victims did not die. Both of these sentences were imposed in Florida, making Florida the only state

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[1] The factual discussion in this Petition is based on the facts presented to the Florida courts. (E.g., R. 6–8, 27–29, 33–34. "R." refers to the one-volume record on appeal in the District Court of Appeal for Florida, First Circuit, case number 1D07-6433.)

to have sentenced a thirteen-year-old to die in prison for a non-homicide. No thirteen-year-old child has been sentenced to die in prison for a non-homicide in over fifteen years.

Extensive research by undersigned counsel has uncovered only eight cases, in only six states, where a thirteen-year-old has been condemned to die in prison for any crime, including homicide.[2] In the vast majority of states, no child Joe's age has been subjected to life imprisonment without possibility of parole, for any crime.

Joe Sullivan is the *only* thirteen-year-old nationwide to have been sentenced to die in prison for sexual battery or rape. His case, however, represents just a tiny fraction of cases in which young teens have been arrested for sexual battery or rape. In just the ten-year period between 1996 and 2005, 12,340 children fourteen years old or younger were arrested for rape nationwide,[3] but *none* of these children was sentenced to life without parole. (Joe's case predates this ten-year period.)

Even in the limited context of juvenile life-without-parole sentences, imposition of the sentence on a thirteen-year-old is freakishly rare. As of 2005,

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[2] Florida, Illinois, Nebraska, North Carolina, Pennsylvania, and Washington. See Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison 20 & n.27 (2007), available at http://eji.org/eji/files/20071017cruelandunusual.pdf [hereinafter Cruel and Unusual]. In compiling this report, undersigned counsel extensively consulted with state departments of corrections, exhaustively reviewed published decisions and news articles available in electronic databases, and consulted with juvenile justice scholars and practitioners. Cf. supra n.1.

[3] This total is based on the Department of Justice Uniform Crime Reports for 1996 to 2005. See generally U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States, http://www.fbi.gov/ucr/ucr.htm. The underlying data for each year is found in the report for that year, as follows: 2005, table 38; 2004, p. 290; 2003, p. 280; 2002, p. 244; 2001, p. 244; 2000, p. 226; 1999, p. 222; 1998, p. 220; 1997, p. 232; 1996, p. 224.

there were at least 2225 people in the United States serving life-without-parole sentences for crimes committed as juveniles, but less than one half of one percent of these prisoners were thirteen or younger at the time of the offense.[4]

Internationally, the United States is the only country in which a thirteen-year-old is known to be sentenced to life in prison without parole.[5] Outside the United States, only a handful of juveniles of any age are known to have been sentenced to life without parole, and only a few countries even theoretically permit such a sentence.[6]

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[4] Amnesty Int'l & Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 21, 26 (2005), available at http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.

[5] Cruel and Unusual, supra n.2, at 13.

[6] See Michelle Leighton & Constance de la Vega, Ctr. for Law & Global Justice, Univ. S.F. Law Sch., Sentencing Our Children to Die in Prison: Global Law and Practice 4, 9–12 (2007), available at http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, forbids a life-without-parole sentence for any child under eighteen. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468–70 (entered into force Sept. 2, 1990). In December 2006, a further resolution calling on all states to abolish the sentence passed the United Nations General Assembly by a vote of 185 to 1 with no abstentions. G.A. Res. 61/146, ¶ 31(a), UN Doc. No. A/Res/146 (Dec. 19, 2006).

The foregoing is based on the facts presented to the Florida courts. See supra n.1. Since the conclusion of the state court proceedings, it has become clear that the United States is now the *only* country to impose life-without-parole sentences for offenses committed before the age of eighteen. See Michelle Leighton & Constance de la Vega, Sentencing Our Children to Die in Prison: Global Law and Practice, 42 U.S.F.L. Rev. 983, 985 (2008) ("[T]here is only one country in the world today that continues to sentence child offenders to LWOP terms: the United States.").

B. Joe Sullivan's Background, Offense, and Conviction[7]

At the time of the offense in 1989, Joe Sullivan was a thirteen-year-old child living in a home where he was regularly subjected to physical and sexual abuse. (R. 5, 18.) Joe also is mentally disabled. (R. 5, 18.) On the day of the crime, two older boys convinced Joe to participate in a burglary. (R. 5, 18.) The three boys entered the home of Lena Bruner in the morning while no one was there. (R. 5, 18.) One of the older boys took some money and jewelry. (R. 5, 18.) The three boys then left. (R. 5, 18.) That afternoon, Ms. Bruner was sexually assaulted in her home. (R. 5, 18.) She never saw her attacker. (R. 5, 18.)

One of the older boys, who may have been the true assailant, accused Joe of the sexual battery. (R. 6, 18.) Each of the older boys received short sentences in juvenile detention. (R. 6, 18.) Thirteen-year-old Joe Sullivan was charged and tried in adult court. (R. 58–61.)

Joe's trial before a six-person jury lasted only one day. (R. 6, 19.) No biological evidence was presented. (The biological evidence that could have exonerated Joe was destroyed in 1993. (R. 6, 18–19.)) Instead, the prosecution relied on testimony from Joe's juvenile co-defendants and a highly suggestive voice identification by the victim, who could say only that Joe's voice "sound[ed] like" and the voice of her assailant. (R. 6, 19; Trial Tr. 88, 91.) The trial, involving an

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[7] This section is based on the record and the unrefuted allegations in Joe Sullivan's postconviction motion. (See R. 1–16.) See Floyd v. State, 808 So. 2d 175, 182 (Fla. 1992) (where trial court denies postconviction motion without evidentiary hearing, court is bound to "accept [the] defendant's factual allegations as true to the extent they are not refuted by the record").

African-American defendant and a white victim, featured repeated, irrelevant references to race. (R. 6, 19; e.g., Trial Tr. 76, 97.)

Joe Sullivan was convicted and sentenced to life imprisonment without parole. (R. 6, 19.) His appointed appellate counsel filed an Anders brief and withdrew.[8] The district court of appeal affirmed the conviction without opinion,[9] and the Supreme Court of Florida likewise dismissed review without opinion.[10] Between 1991 and 1997, without the assistance of counsel, Joe attempted to challenge his conviction unsuccessfully. (R. 67-68.) In 2007, undersigned counsel agreed to help Joe and attempted to prove his innocence through a motion for DNA testing; the motion was denied after a hearing because all biological evidence had been destroyed by the State. (R. 4, 70-71.)

C. Procedural History of Judgment on Review in This Petition

After this Court recognized constitutional limits on sentencing based on an evolving national consensus on the reduced criminal culpability of juveniles in Roper v. Simmons, 543 U.S. 551 (2005), undersigned counsel filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The motion argued that the Eighth and Fourteenth Amendments prohibited imposition of a life-without-parole sentence on a thirteen-year-old child convicted of a non-homicide.

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[8] See Sullivan v. State, No. 1D90-190 (Fla. 1st Dist. Ct. App.) (docket entry for Dec. 4, 1990). By filing an Anders brief, counsel asserted that there were no issues worth raising on appeal. Anders v. California, 386 U.S. 738, 744 (1967).

[9] Sullivan v. State, No. 1D90-190, 580 So. 2d 755 (Table) (Fla. 1st Dist. Ct. App. May 22, 1991).

[10] Sullivan v. State, No. 78050, 583 So. 2d 1037 (Table) (Fla. June 12, 1991).

(R. 1–13, 71.) The trial court dismissed the motion with prejudice in a five-page order.[11] (See App. C.)

Counsel timely appealed the trial court's dismissal, and the district court of appeal summarily affirmed without opinion.[12] (See App. B.) The district court of appeal then denied a timely motion for rehearing and/or certification to the Supreme Court of Florida. (See App. A.) Because the district court of appeal affirmed without opinion, Florida law did not permit review in the Supreme Court of Florida. Jackson v. State, 926 So. 2d 1262, 1265 (Fla. 2006).

D. The State Court Ruling on Review

In its order and judgment dismissing Joe Sullivan's postconviction motion, the trial court held the motion to be untimely based on a conclusion that it did not raise a valid constitutional claim. (App. C at 3–4.) Generally, motions under Florida Rule of Criminal Procedure 3.850 must be brought within two years of a final conviction, but there is an exception where "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively."[13] The trial court acknowledged the potential applicability of this exception, noting that Roper v. Simmons, 543 U.S. 551 (2005), applied retroactively and that Joe's motion argued that "after . . . Roper it is

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[11] State v. Sullivan, No. 1989 CF 002693 A (Fla. 1st Cir. Ct. Oct. 31, 2007).

[12] Sullivan v. State, No. 1D07-6433, 987 So. 2d 83 (Table), 2008 WL 2415314 (Fla. 1st Dist. Ct. App. June 17, 2008) (per curiam).

[13] Fla. R. Crim. P. 3.850(b)(2).

unconstitutional to sentence a thirteen-year-old child to die in prison." (App. C at 3–4.) However, the court stated that Joe Sullivan "does not have a valid constitutional claim" because Roper was a capital case. (App. C at 4.) Hence, the court held, his Eighth Amendment claim "must be dismissed as procedurally barred." (App. C. at 4.)

The trial court went on to address the merits of Joe's Eighth Amendment claim, stating that "[e]ven if Defendant's motion were properly before the Court, [his] argument is meritless." (App. C. at 4.) To support this conclusion, the court cited cases where the Supreme Court of Florida had declined to extend Roper v. Simmons to defendants *over* the age of eighteen.[14] (App. C. at 4.) The trial court also stated that "the Supreme Court of Florida has made clear that a sentence of life imprisonment without parole is a perfectly acceptable penalty under Roper," citing Ramirez v. State, 909 So. 2d 862 (Fla. 2005). (App. C at 4–5.) Ramirez involved a seventeen-year-old convicted of first-degree murder who was sentenced to life *with* the possibility of parole.[15] In short, the trial court, in deciding that Joe Sullivan

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[14] Kearse v. State, 969 So. 2d 976 (Fla. 2007) (declining to extend Roper to eighteen-year-old); Melton v. State, 949 So. 2d 994, 1020 (Fla. 2006) (declining to find that Roper prevents consideration of juvenile convictions when imposing death penalty on adult defendant); England v. State, 940 So. 2d 389, 406–07 (Fla. 2006) (same); Grossman v. State, 932 So. 2d 192 (Fla. 2006) (table) (affirming without opinion over argument to extend Roper to nineteen-year-old).

[15] See State v. Ramirez, 850 So. 2d 620, 623 (Fla. 2d Dist. Ct. App. 2003) (Fulmer, J., dissenting) (noting age and offense). Mr. Ramirez is sentenced to life with the possibility of parole after 25 years because he committed his offense on March 10, 1995, prior to the October 1, 1995 effective date of the statute authorizing life without parole for capital murder. See 1995 Fla. Laws. ch.95-294, § 4 (eff. Oct. 1, 1995) (now codified at Fla. Stat. § 775.082(1)); see also Florida Inmate Population Information, http://www.dc.state.fl.us/ActiveInmates (confirming date of Ramirez's offense).

could not state an Eighth Amendment claim, did not consider the fact that he was only thirteen at the time of the crime or that his offense was a non-homicide, and relied exclusively on cases involving adult defendants and homicides.

REASONS FOR GRANTING THE WRIT

Joe Sullivan's sentence—life imprisonment without parole for a non-homicide committed at age thirteen—raises a novel and important constitutional issue regarding the culpability of very young teens. The Florida courts summarily rejected the constitutional validity of this Eighth Amendment claim. Federal habeas corpus review is unlikely. Presentation of the claim in a less complex procedural posture in a subsequent case is similarly improbable. Ironically, one of the very characteristics that renders Joe's sentence unconstitutional—that it is freakishly rare—essentially means that if this Court does not exercise jurisdiction now, the merits of the underlying constitutional issue will go unreviewed indefinitely.

Fairness requires that the merits of Joe Sullivan's claim be reviewed because his sentence violates the Eighth Amendment. Even in a system that regularly imposes harsh, adult penalties on older teens, a life-without-parole sentence for a thirteen-year-old is so rare, and consequently capricious and arbitrary, as to be cruel and unusual. The near uniqueness of Joe's sentence accords with this Court's recognition in Roper v. Simmons, 543 U.S. 551 (2005), of a national consensus regarding the reduced criminal culpability of juveniles, and shows that the

consensus is particularly strong in regard to the difference between very young adolescents and older teens.

I. JOE SULLIVAN'S EIGHTH AMENDMENT CLAIM SHOULD BE REVIEWED ON THE MERITS, AND A WRIT OF CERTIORARI FROM THIS COURT PROVIDES THE ONLY MEANINGFUL OPPORTUNITY FOR SUCH REVIEW.

This Court should take jurisdiction because Joe Sullivan has a valid and extraordinarily important constitutional claim that should be heard on the merits. See Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality op.) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Absent review by this Court now, the underlying claim will go unreviewed. Such a failure of review would be unwise and unjust because it would leave Joe Sullivan without a means to access this Court's recognition of society's evolved thinking regarding the limited culpability of juveniles in the Eighth Amendment context. Further, this Court's review is not barred by rules of finality or jurisdiction where the state court's dismissal depended on a threshold analysis of the underlying federal constitutional question. Therefore, this Court should grant certiorari.

A. If This Court Does Not Review Joe Sullivan's Claim Now, a Novel and Important Constitutional Question Will Go Unreviewed.

The Florida courts dismissed this important constitutional claim on procedural grounds. As explained below, infra Part I.B–C; that dismissal does not bar this Court's review, because the state court's procedural ruling was intertwined with a threshold issue of federal constitutional law and because the unusual nature

of Joe Sullivan's sentence has become clearer with the passage of time. Nevertheless, this Court might normally be inclined to wait for the issue to arise in another case, in a less complicated procedural posture.

The problem with this approach, however, is that Joe's claim is *truly and extremely* unusual, and becoming more so every year. Only two thirteen-year-olds currently are sentenced to die in prison for non-homicides in the United States, and Joe is one of only eight thirteen-year-olds sentenced to die in prison for any crime. It has been more than fifteen years since such a sentence was imposed for a non-homicide. There may not be another opportunity for this Court to address this issue.[16]

Moreover, federal habeas corpus will not provide an outlet for relief in this case. Given the limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the nature of this claim, the lower federal courts will not have the authority to resolve the constitutional question presented in this case. See 28 U.S.C. § 2244(d) (one-year statute of limitations on federal habeas corpus claims). Such circumstances previously have prompted four members of this Court to suggest that the Court must look more closely at certiorari petitions from state postconviction proceedings, Lawrence v. Florida, 127 S. Ct. 1079, 1089 n.7 (2007) (Ginsburg, J., dissenting) ("Since AEDPA . . . our consideration of state

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[16] Cf., e.g., Lackey v. Texas, 514 U.S. 1045, 1047 (1995) (Mem. of Stevens, J., respecting denial of certiorari) ("Often, a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'").

habeas petitions has become more pressing."); this case illustrates the wisdom of that suggestion.

In sum, the Florida courts did not conduct an appropriate analysis of this Eighth Amendment claim, because the trial court incorrectly concluded that Joe Sullivan had not even stated a "constitutional claim." (App. C at 4.) The state courts never mentioned or considered the constitutionally significant distinction between children and older teens. Moreover, due to substantial procedural and substantive restrictions, this claim is unlikely to receive merits review in a federal habeas corpus court. Thus, if this Court, in this posture, declines to take jurisdiction, the merits of an important federal constitutional claim may go unreviewed indefinitely. This Court should take jurisdiction to ensure that Joe's arguments receive a hearing. See Lawrence, 127 S. Ct. at 1089 n.7 (Ginsburg, J., dissenting) ("Even if rare, the importance of our review of state habeas proceedings is evident."); see also Knight v. Florida, 528 U.S. 990, 993–94 (1999) (Breyer, J., dissenting from denial of certiorari) (arguing that Court should take jurisdiction to resolve important and relatively rare Eighth Amendment Lackey claim, despite lack of division on question in lower courts).

B. This Court Should Review Joe Sullivan's Claim on the Merits Now Because the Complete Basis for That Claim Emerged Only Over Time.

Although the Florida courts applied a type of procedural bar to Joe Sullivan's Eighth Amendment claim, this Court can and should take jurisdiction, not only

because of the intertwining of federal constitutional issues in the state court's decision, discussed infra Part I.C, but also because this is one of the rare claims that must be considered even at a time relatively remote from conviction, regardless of default rules for finality, lest it escape review entirely.

i. Joe Sullivan should have access to evolved societal and legal values concerning the culpability of children and juveniles.

Since his conviction, the legal basis for this issue has evolved, most notably due to this Court's recognition, in Roper v. Simmons, 543 U.S. 551 (2005), of a developing scientific and societal consensus concerning the reduced criminal culpability of juveniles. The distinct constitutional analysis and evolved thinking represented by the Roper decision now make clear that Joe's sentence is categorically unconstitutional, and this Court should take jurisdiction to ensure that he can access that evolved thinking.

This Court has recognized that "'[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose,'" Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)), and has thus retroactively applied constitutional "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Id. (citation and internal quotation marks omitted). Joe's claim clearly falls under this doctrine.

Thus, although Florida generally is entitled to limit access to postconviction relief through valid procedural rules, in this case, even if this Court finds that Florida acted under an independent state rule, jurisdiction should not be declined on that basis. Because the sheer unusualness of this sentence is likely to prevent recognition of its unconstitutionality in another case, see supra Part I.A, this Court should take jurisdiction to ensure that Joe has access to its evolved Eighth Amendment doctrine.

This case involves a categorical challenge to imposition of an extremely serious penalty—the "penultimate sentence," Solem v. Helm, 463 U.S. 277, 303 (1983)—on a thirteen-year-old child for a non-homicide. In such circumstances, this Court has made clear that rules "implemented to further the principles of comity, finality, and federalism" should not be interpreted to completely bar potentially meritorious federal claims from hearing in a federal forum. Panetti v. Quarterman, 127 S. Ct. 2842, 2855 (2007) (construing AEDPA so as not to preclude federal merits consideration of potentially meritorious Ford claims); cf. Nelson v. Campbell, 541 U.S. 637 (2004) (interpreting 42 U.S.C. § 1983 to allow challenge to pre-execution "cut down" procedure in case where habeas corpus challenge would have been procedurally barred as second and successive). Instead, this Court has explained that where "the Constitution itself deprives the State of the power to impose a certain penalty, . . . finality and comity concerns . . . have little force." Penry, 492 U.S. at 330. Accordingly, as in other cases involving claims that imposition of a

certain punishment on a certain class of defendants is categorically prohibited, this Court should interpret the general rules of finality to permit merits review in this case.

ii. The unusual and cruel character of Joe Sullivan's sentence has become clear with the passage of time.

When Joe Sullivan was sentenced, an explosion in harsh juvenile sentencing was just getting underway, and the trend and national consensus appeared to support expanded imposition of harsh, adult sanctions on juveniles. See Roper, 543 U.S. at 566 (noting "particular trend in recent years toward cracking down on juvenile crime") (citing Howard N. Snyder & Melissa Sickmund, Nat'l Ctr. for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report 89, 133 (1999)[17]). As it turns out, that trend did not extend to sentencing very young teens to life in prison without parole—only two thirteen-year-olds are now serving such sentences for non-homicides, and only eight for any crime. See supra Statement of the Case Part A, pp. 2–4 & nn.1–6. Because this claim turns on an analysis of what other states are doing over time, however, the unusualness of Joe's sentence could

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[17] Available at http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html (Chapter 4). This report describes how "[i]n the 1980's, the pendulum began to swing toward law and order," with the increased, mandatory channeling of juvenile offenders into the adult criminal justice system and a concomitant increase in sentences, and how "[t]he 1990's . . . [were] a time of unprecedented change as State legislatures crack[ed] down on juvenile crime." Id. at 88–89; see also id. at 108 ("As many States have shifted the purpose of juvenile court away from rehabilitation and toward punishment, accountability, and public safety, the emerging trend is toward dispositions based more on the offense than the offender."); id. at 89 (stating that "[b]etween 1992 and 1997, all but three States changed laws" to reduce protections and increase punishment for juvenile offenders, including 45 states which "made it easier to transfer juvenile offenders from the juvenile justice system to the criminal justice system" and 31 states which "expanded sentencing options" for juveniles).

not easily be perceived at the time of sentencing. Now, twenty years later, the cruelty and unusualness of the sentence has become clear enough to require constitutional recognition, and Joe should have access to meaningful review. As discussed above in Part I.A, the only court that realistically can review the merits of his claim is this Court.

This Court has exempted Ford claims[13] from the normal, finality-based limits on second and successive federal habeas corpus petitions because "[Ford] claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition." Panetti, 127 S. Ct. at 2852; see id. at 2855 ("We are hesitant to construe [AEDPA], implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party."); see also Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998) (interpreting AEDPA provision governing "second or successive" petitions to permit reassertion of Ford claim previously dismissed as unripe and noting: "Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now.").

Joe's claim should be treated similarly, because the unusualness of his sentence was hard to perceive initially. Just as a prisoner who seeks to make a

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[13] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (plurality op.) (holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane"); cf. Lackey v. Texas, 514 U.S. 1045 (1995) (Mem. of Stevens, J., respecting denial of certiorari) (raising possibility that inordinate delay before execution could violate Eighth Amendment and invalidate death sentence).

Ford claim cannot know what his mental condition will be when the relevant time frame arrives, cf. Herrera v. Collins, 506 U.S. 390, 406 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution."), Joe could not have known, while his conviction was on direct review, whether the trend of increasingly harsh juvenile punishment would include expanded imposition of life without parole on young teens.

Joe was sentenced to life in prison without parole for a non-homicide in the midst of an historic, national explosion in the treatment of juvenile offenders as adults, and his unusualness claim did not fully emerge until it became possible to discern that—even given this new regime of substantially expanded sanctions against juvenile offenders, including young teens—sentences like Joe's *still* would almost never be imposed. See Roper, 543 U.S. at 566 (noting that trend toward abolition or disuse of juvenile death penalty "carrie[d] special force in light of the general popularity of anticrime legislation, . . . [and] the particular trend in recent years toward cracking down on juvenile crime in other respects"). Moreover, review of Joe's claim is especially important and appropriate due to the impact of Roper v. Simmons and its recognition of societal values concerning the reduced culpability of juveniles. This Court should take jurisdiction to allow merits review of Joe's Eighth Amendment claim.

C. This Court Should Take Jurisdiction Because the State Court's Ruling Is Based On a Threshold Determination of Federal Constitutional Law.

The state courts' decision "rests, as a threshold matter, on a determination of federal law." Ohio v. Reiner, 532 U.S. 17, 20 (2001). The state court held that "Defendant does not have a valid [federal] constitutional claim. Hence, Defendant's claim . . . must be dismissed as procedurally barred." (App. C at 4.[19]) This analysis expressly premises the decision to apply a state-law procedural bar on a threshold analysis of federal constitutional law, and thus the court's decision cannot be said to rest independently on state-law grounds. See Reiner, 532 U.S. at 20 ("[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.") (internal quotation marks omitted).

Joe's Eighth Amendment claim was squarely presented to the state trial court, which based its ruling on a threshold analysis of federal law and summarily concluded that Joe did not have a valid constitutional claim. This Court should take jurisdiction to correct the state court's erroneous conclusion and ensure that Joe's important constitutional claim is heard.

[19] See also supra Statement Part D (describing state trial court's decision).

II. A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED ON A THIRTEEN-YEAR-OLD CHILD FOR A NON-HOMICIDE VIOLATES THE PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Children thirteen and younger are a distinct group for whom a sentence of life in prison without parole violates the Eighth Amendment of the United States Constitution. Children are distinct from older teens developmentally and for purposes of criminal punishment. In Roper v. Simmons, 543 U.S. 551 (2005), this Court recognized that categorical differences render juveniles less criminally culpable than adults and therefore not subject to the harshest adult sanctions. The same principles and the same science recognized in Roper also demonstrate that thirteen-year-old children are distinct from, and substantially less culpable than, older teens, and thus, as a class, are not sufficiently culpable to justify imposition of the penultimate sentence of life imprisonment without parole. Moreover, national statistics[20] demonstrate that children thirteen or younger are almost never sentenced to die in prison—particularly for non-homicides. The freakishly rare character of Joe Sullivan's sentence renders it so capricious as to be unconstitutionally cruel and unusual.

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[20] See supra Statement Part A ("Rarity of death-in-prison sentences for thirteen-year-olds"), pp. 2–4 & nn.1–6.

A. The Principles Recognized in Roper v. Simmons Compel the Conclusion That the Constitution Prohibits Sentencing a Thirteen-Year-Old Child to Die in Prison for a Non-Homicide.

The small number of children aged thirteen or younger sentenced to die in prison is particularly significant to evaluating contemporary standards of decency given the new constitutional limits on sentencing children recognized by this Court in Roper v. Simmons, 543 U.S. 551 (2005). In Roper, this Court recognized expanded requirements of the Eighth Amendment with respect to the sentencing of juveniles. Recognizing that three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," this Court prohibited death sentences for older teenagers. Roper, 543 U.S. at 569. The same analysis compels the conclusion that a life-without-parole sentence for a very young adolescent like Joe is similarly prohibited.

First, this Court found that juveniles tend to suffer from a "lack of maturity and an underdeveloped sense of responsibility," which often result in "impetuous and ill-considered actions and decisions." Id. (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)). Thus, "adolescents are overrepresented . . . in virtually every category of reckless behavior." Id. (internal quotation marks omitted). A thirteen-year-old's lack of responsibility is consonant with recent research indicating that the human brain continues to develop into an individual's early twenties. See infra Part II.B.i (summarizing recent research developments).

Second, young children are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Roper, 543 U.S. at 569. They have "less control . . . over their environment [and therefore] . . . lack the freedom that adults have to extricate themselves from a crimonogenic setting." Id. (internal quotation marks omitted.) As this Court recognized in Eddings v. Oklahoma, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." 455 U.S. 104, 115 (1982).

Finally, the character of a child is "not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." Roper, 543 U.S. at 570. As a consequence of these limitations, the Court concluded that it would be "misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." Id.

B. The Law Recognizes the Critical Difference Between Thirteen-Year-Old Children and Older Adolescents.

In Roper, this Court recognized the categorical differences in development between juveniles and adults, and that these differences are highly relevant to determinations of culpability and permissible punishment. Such concerns are even more important when addressing the comparative culpability of children thirteen and younger, and this crucial distinction is reflected in all facets of the law.

The Florida Legislature, all other states, Congress, and this Court all have recognized the important distinction between thirteen-year-olds and older teens.

Like every other state, Florida acknowledges that a thirteen-year-old child's decision-making capacity is even less developed than that of older teens by placing additional legal restrictions on very young adolescents. Florida law requires that thirteen-year-olds attend school. Fla. Stat. § 1003.21(1)(a) (2006). Thirteen-year-olds cannot drive. Id. § 322.05(1). Thirteen-year-olds cannot consent to sexual activity. Id. § 800.04. The federal government strictly regulates the hours and conditions under which thirteen-year-olds may be employed. See 29 U.S.C. §§ 203, 212, 213. None of these restrictions apply with the same force to older teens.

Moreover, courts previously have found the differences between very young teens and older juveniles to be of critical significance in sentencing. In 1968, the Kentucky Court of Appeals (that state's highest court at the time) held that imposition of life in prison without parole on two fourteen-year-olds convicted of rape was cruel and unusual punishment. Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968); see also Naovarath v. State, 779 P.2d 944, 948–49 (Nev. 1989) (mitigating life-without-parole sentence for thirteen-year-old convicted of murder to life with possibility of parole under Eighth Amendment and Nevada Constitution). Twenty years later, in Stanford v. Kentucky, this Court distinguished younger adolescents from those sixteen and older, permitting sixteen- and seventeen-year-olds to be subjected to harsher punishments, including death. 492 U.S. 361, 380 (1989). Although the holding of Stanford was overruled by Roper, there is no indication that this Court intended to abandon the constitutionally significant

sentencing distinction between young adolescents and older teenagers. See also Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality op.) (prohibiting the death penalty for children fifteen and under, in part because "[a]dolescents, *particularly in the early and middle teen years*, are more vulnerable, more impulsive and less self-disciplined than adults" (internal quotation marks omitted) (emphasis added)).

As Justice Scalia noted in dissent in Roper, even at pre-founding common law "there was a rebuttable presumption of incapacity to commit a . . . felony until the age of 14." Roper, 543 U.S. at 609 n.1 (Scalia, J., dissenting) (citing Stanford, 492 U.S. at 368; 4 W. Blackstone, Commentaries *23–*24; and 1 M. Hale, Pleas of the Crown 24–29 (1800)). Today, the law still draws significant distinctions between young adolescents and older teens. Because thirteen-year-olds are a distinct group of juvenile offenders, the lower court mischaracterized the issue in this case when it referred to the claim as an argument that the constitution "should disallow the sentencing of *juvenile* offenders to life in prison without parole." (App. C at 3 (emphasis added).) The Eighth Amendment claim in this case is specific to thirteen-year-olds, who, as young adolescents, are substantially different from older teens in ways that are constitutionally relevant to punishment. This Court should grant certiorari and recognize this constitutionally significant distinction.

C. The Extreme Rarity of Sentencing a Thirteen-Year-Old to Die in Prison Shows that Such a Sentence Is Cruel and Unusual in Violation of the Eighth Amendment.

The practice of sentencing thirteen-year-olds to life imprisonment without parole is so infrequent as to render it arbitrary and "unusual" punishment prohibited by the Eighth Amendment. In interpreting the Eighth Amendment's prohibition against cruel and unusual punishments, courts must refer to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. Roper, 543 U.S. at 560–61 (citing Trop, 356 U.S. at 100–01 (plurality op.)). "Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance." Thompson, 487 U.S. at 823 n.7.

It is well-established that courts should look to the frequency with which a punishment is imposed in determining whether it is unusual for Eighth Amendment purposes. In Furman v. Georgia, this Court struck down Georgia's statute "under which the death penalty was 'infrequently imposed' upon 'a capriciously selected random handful.'" Godfrey v. Georgia, 446 U.S. 420, 438 (1980) (Marshall, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring)); see also id. at 440 n.9 (noting that, in Furman, Justices Stewart and White "concurred in the judgment largely on the ground that

the death penalty had been so infrequently imposed that it made no contribution to the goals of punishment."). This Court also relied on the infrequency of the penalty in striking down statutes authorizing imposition of the death penalty for non-homicides or for any crime committed before the age of sixteen. Coker v. Georgia, 433 U.S. 584, 596–97 (1977) (rarity of death sentences for rape of an adult woman relevant to conclusion that death penalty is cruel and unusual punishment for that crime); Kennedy v. Louisiana, 128 S. Ct. 2641, 2658 (2008) (fact that "Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape" relevant to "national consensus against capital punishment for the crime of child rape"); Thompson, 487 U.S. 815, 832–33 (exceeding rarity with which death penalty imposed on offenders under sixteen relevant to conclusion that contemporary standards of decency prohibited their execution).

When Atkins v. Virginia was decided, only a minority of states permitted the execution of the mentally retarded, "and even in those [twenty] States it was rare. On the basis of these indicia, the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" Roper, 543 U.S. at 563 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)). Similarly, in Roper, this Court found "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal'" so as to render the juvenile death penalty unconstitutionally cruel and unusual based in part on the infrequency of its use

even in states where it remained on the books. Id. at 567; see also id. at 564 (noting that even in twenty states without formal prohibition on executing juveniles, "the practice is infrequent").

The facts surrounding Joe Sullivan's sentence are at least as compelling as those which led this Court to conclude that a national consensus had developed against the imposition of the death penalty for non-homicides, or against execution of juvenile offenders or the mentally retarded. As explained above, see supra Statement of the Case Part A, thirteen-year-olds sentenced to die in prison constitute a "capriciously selected random handful," Furman, 408 U.S. at 309–10 (Stewart, J., concurring), of juvenile offenders.[21] Joe's is the *only known death-in-prison sentence imposed on a thirteen-year-old for a sexual offense.* Florida is the *only state* to impose death in prison on a thirteen-year-old for a non-homicide, and

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[21] For convenience, the following is a summary of the information provided in more detail above at Statement of the Case Part A, pp. 2–4 & nn.1–6:

Extensive research by undersigned counsel has uncovered only two cases in the United States, including Joe Sullivan's case, where thirteen-year-olds have been condemned to die in prison for crimes in which the victim did not die. Florida is the *only state* to have sentenced a thirteen-year-old to die in prison for a non-homicide. No thirteen-year-old child has been sentenced to die in prison for a non-homicide in over fifteen years.

Joe also is the only thirteen-year-old nationwide have been sentenced to die in prison for sexual battery or rape, although young teens frequently are arrested for such crimes. Over 12,000 children fourteen or younger arrested for sexual battery or rape between 1996 and 2005, but *none* of these children was sentenced to life without parole (Joe's case predated this period).

Only eight thirteen-year-olds in the United States have been sentenced to life without parole for any crime, including homicide. The cases come from only six states; in the vast majority of states, *no* child Joe's age has been sentenced to life without parole. Even in states where the sentence has been imposed it is rare. In four of the other states, only one child has received that sentence, and in Florida and Pennsylvania, there are only two.

These eight thirteen-year-olds reflect less than one half of one percent of the more than 2000 juveniles sentenced to die in prison in the United States. Internationally, no thirteen-year-old is known to have been sentenced to life without parole, and only a handful of countries permit the sentence for juveniles of any age.

only six states[22] have imposed such a sentence for any crime. The vast majority of states in this country have not sentenced any child as young as Joe to die in prison.

Further, every state that has explicitly considered the minimum age at which children may be sentenced to life without parole has set that minimum well above thirteen.[23] The only court to expressly consider the constitutionality of a life-without-parole sentence imposed on a young teen for rape found the sentence unconstitutional under the Eighth Amendment. See Workman, 429 S.W.2d at 378 (holding that "life imprisonment without benefit of parole for two fourteen-year-old youths under all the circumstances shocks the general conscience of society . . . and is intolerable to fundamental fairness" and that "it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life").

In sum, all of the domestic evidence made relevant by this Court's prior decisions points to the conclusion that Joe's sentence is so rare, disfavored, and arbitrary as to be cruel and unusual under the Eighth Amendment. Moreover, as in Roper, this evidence "carries special force in light of the general popularity of anticrime legislation, . . . and in light of the particular trend in recent years toward

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[22] See supra n.1.

[23] See D.C. Code § 22-2104 (setting minimum age for life without parole for murder at 18); Kan. Stat. § 21-4622 (same); Cal. Penal Code § 190.5 (setting minimum age for life without parole for murder at 16); Ind. Code § 35-50-2-3 (same); Ky. Rev. Stat § 640.040 (exempting juveniles from harshest sentences including life without parole for murder); Colo. Rev. Stat § 17-22.5-104(2)(d)(IV) (making juveniles convicted as adults eligible for parole); Or. Rev. Stat. § 161.620 (prohibiting life without parole for anyone waived from juvenile court); La. Rev. Stat. § Children's Code Art. 857(B) (prohibiting confinement of 14-year olds transferred to criminal court beyond age 31).

cracking down on juvenile crime in other respects." 543 U.S. at 566 (citing Snyder & Sickmund, supra n.21, at 89, 133).

In Roper, this Court also reaffirmed its practice of referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" 543 U.S. at 575. The Court referred to the Convention on the Rights of the Child's prohibition against imposing the death penalty on juveniles and noted that "[p]arallel prohibitions are contained in other significant international covenants." Id. at 576. As noted above, see supra nn.5–7 and accompanying text, the United States is the only country known to have sentenced a thirteen-year-old to life in prison without parole; it is one of only a few countries that even theoretically permit such a sentence; and the Convention on the Rights of the Child and other, near-unanimous international proclamations prohibit the imposition of the sentence on juveniles of any age.

Florida is the *only state in the country* to have sentenced a thirteen-year-old child to die in prison for an offense in which the victim did not die, and Joe is the only thirteen-year-old in the country to have received such a sentence for sexual battery. This Court has made clear that rape and sexual battery, while extremely serious, differ categorically from intentional murder. See Kennedy, 128 S. Ct. at 2660 (holding that rape and even child rape "may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the

public, they cannot be compared to murder in their severity and irrevocability"). Moreover, even including homicide cases, life without parole has only been imposed on eight thirteen-year-old children in six states. The rarity with which life imprisonment without parole is imposed on thirteen-year-old children reflects community norms and values that have evolved and now reject death-in-prison sentencing for young children Joe's age. Accordingly, Joe's sentence now violates the Eighth and Fourteenth Amendments to the United States Constitution.

D. Scientific Research Establishes that Young Teens Are Psychosocially and Neurologically Different from Older Teens in Constitutionally Relevant Ways.

This Court's analysis in Roper has the greatest force and application to the youngest offenders, because developmental differences between young teenagers and adults are even more pronounced than the differences between older juveniles and adults. This makes the issue of reduced culpability most compelling in this case. Joe was only thirteen years old when he was sentenced to the harshest sentence possible under Florida law, with no mitigating weight given to his age or the constitutional considerations relevant to juvenile sentencing after Roper.

Psychosocial research confirms that younger teenagers are less developed than older adolescents in areas directly related to criminal culpability:

responsibility, perspective, and impulse control.[24] In considering adolescent decision-making capabilities,

> distinctions must be drawn older and younger adolescents . . . [because] it is clear that important progress in the development of decision-making competence occurs sometime during *late* adolescence, and that these changes have a profound effect on their ability to make consistently mature decisions.[25]

In the context of legal competence, an extensive study of adolescent decision-making concluded that "juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants."[26]

In addition to this growing body of psychosocial research, recent developments in the field of adolescent neuroscience reveal that the brains of young adolescents are not as developed as those of adults or older teenagers. Advances in

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[24] See, e.g, Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & L. 741, 756 (2000) (noting that the steepest upswing in psychosocial development occurs at and after age sixteen).

[25] Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults , 22 J. Applied Developmental Psychol. 257 (2001) (emphasis added).

[26] Thomas Grisso, et al., Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, 27 L. & Hum. Behav. 333, 356 (2003). See also id. ("Based on criteria established in studies of mentally ill adult offenders, approximately one-third of 11- to 13-year-olds, and approximately one-fifth of 14- to 15-year-olds, are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts. Our results also indicate that the competence-relevant capacities of 16- and 17-year-olds as a group do not differ significantly from those of young adults. These patterns of age differences are robust across groups defined by gender, ethnicity, and socioeconomic status, and they are evident among individuals in the justice system and in the community." (citations omitted)).

functional magnetic resonance imaging (FMRI) technology, beginning in the 1990s, "have opened a new window into the differences between adolescent and adult brains." Brief for Amer. Psychological Ass'n & Mo. Psychological Ass'n as Amici Curiae Supporting Respondent, at 9, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633). Technological advances have led scientists to reject the previously widely-held belief that the brain is fully developed early in childhood.[27]

Of particular note are the differences scientists have exposed between young adolescents and older individuals in the frontal lobes of the brain, which are critical to the brain's executive functioning, including planning and self-regulation.[28] This research shows that young adolescents are less able to make responsible decisions than even older teens, precisely the type of evidence that this Court has found important under the Eighth Amendment. E.g., Roper, 543 U.S. at 570 (2005) ("The susceptibility of juveniles to immature and irresponsible behavior means their

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[27] See, e.g., Paul Raeburn, Too Immature for the Death Penalty?, N.Y. Times, Oct. 17, 2004 (Magazine) at 26; Brain Development and Puberty May Be Key Factors in Learning Disorders, Science Daily, June 22, 2004, http://www.sciencedaily.com/releases/2004/06/040622021222.htm ("Until recently, it was thought that the brain was fully developed relatively early in childhood. Today it is clear that the teenage brain is a formidable work-in-progress undergoing myriad changes.").

[28] See Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77–85 (2004) (explaining that white brain matter increases in linear fashion throughout adolescence, facilitating cognitive complexity, while gray brain matter is "prun[ed]" in later teen years, making more efficient that part of the brain responsible for inhibiting impulses and assessing risks). See also Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults, 9 Quinnipiac Health L.J. 1, 12 (2005); Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1013 (2003) ("[P]atterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into adolescence.").

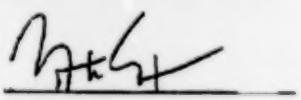
irresponsible conduct is not as morally reprehensible as that of an adult.") (citation and internal quotation marks omitted).

Very young teens are distinct from older teens developmentally and for purposes of criminal punishment. A sentence of life without parole for a non-homicide by a thirteen-year-old child is so rare as to be essentially random in application. Accordingly, and for all the reasons stated above, this Court should take jurisdiction and declare that Joe Sullivan's sentence violates the Constitution.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Court of Appeal of Florida for the First District and declare his rights were violated.

Respectfully submitted,



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December 4, 2008

OPPOSITION BRIEF

(28)

No. 08-7621

IN THE
SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

DID THE FLORIDA COURTS VIOLATE THE CONSTITUTION WHEN THEY APPLIED FLORIDA'S REGULARLY ENFORCED POST CONVICTION RULES AND DISMISSED SULLIVAN'S POST CONVICTION MOTION AS UNTIMELY?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Statement of Jurisdiction 1

Constitutional Provisions 3

Statement of the Case 3

Reasons for Denying the Writ 8

DID THE FLORIDA COURTS VIOLATE THE CONSTITUTION WHEN THEY APPLIED FLORIDA'S REGULARLY ENFORCED POST CONVICTION RULES AND DISMISSED SULLIVAN'S POST CONVICTION MOTION AS UNTIMELY? 8

Conclusion 14

TABLE OF AUTHORITIES

Pages

Cases

Adams v. Robertson, 520 U.S. 83 (U.S. 1997) 2

Byrd v. Quarterman, Case No. 3:08cv1414b, 2008 WL 4427265 (N.D. Tex. Sept. 26, 2008) 12

Calderon v. Schribner, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009) 12

Campbell v. Louisiana., 523 U.S. 392 (U.S. 1998) 2

Cobos v. Dennison, 825 N.Y.S.2d 332 (N.Y. Sup. Ct., App. Div. 2006) 13

Connell v. State, Case No. CR-06-0668, 2008 Ala. Crim. App. LEXIS 108 (Ala. Crim. App. May 30, 2008) 12

Culpepper v. McDonough, 2007 U.S. Dist. LEXIS 50866, 2007 WL 2050970 (M.D. Fla. 7/13/2007) 11, 12

Culpepper v. State, 971 So. 2d 259 (Fla. 2d DCA 2008) 13

Douma v. Workman, 2007 WL 2331883 (N.D. Okla. 2007) 12

Gurerro v. State, Case No. 13-05-00709-CR, 2008 Tex. App. LEXIS 1837 (Tex. Crim. App. March 13, 2008) 13

Gussler v. Commonwealth, 236 S.W.3d 22 (Ky. Ct. App. 2007) 13

Harmelin v. Michigan, 501 U.S. 957, 996 (U.S. 1991) 10

Herrera v. Collins, 506 U.S. 390, 412 (1993) 10

In re Hill, 437 F.3d 1080, fn. 1 (11th Cir. 2006) 11

People v. Demirdjan, 50 Cal. Rptr. 3d 184 (Cal. App. Ct. 2006) 13

People v. Griffin, 857 N.E.2d 889 (Ill. App. Ct. 2006) 13

People v. Metzger, Case No. B198096, 2008 Cal. App. Unpub 12

Pineda v. Leblanc, Case No. 07-3598, 2008 WL 294685 (E.D. La. Jan. 31, 2008) 12

Price v. Cain, Case No. 07-937, 2008 U.S. Dist. LEXIS 23474 (W.D. La. March 4, 2008) 12

Roper v. Simmons, 543 U.S. 551 (2005) 6, 9, 11, 12,13

Schane v. Cain, Case No. 07-1068, 2007 U.S. Dist. LEXIS 96538 (W.D. La. Oct. 24, 2007) 11, 12

Sharikas v. Kelly, 2008 U.S. Dist. LEXIS 29153 (E.D. Va. Apr. 7, 2008) 12

Sims v. Commonwealth, 233 S.W.3d 731 (Ky. Ct. App. 2007) 13

Smith v. Howes, Case No. 06cv10905, 2007 WL 522697 (E.D. Mich. Feb. 14, 2007) 11, 12

State v. Allen, 958 A.2d 1214 (Conn. 2008) 13

State v. Avery, 649 S.E.2d 102 (S.C. Ct. App. 2007) 13

State v. Bunch, Case No. 06-MA-106, 2007 Ohio 7211, 2007 Ohio App. LEXIS 6314 (Ohio Ct. App. Dec. 21, 2007) 13

State v. Medina, 622 S.E.2d 176 (N.C. Ct. App. 2005) 13

State v. Ocak, Case No. 56006-9-I, 2006 Wash. App. LEXIS 1126 (Wash. Ct. App. June 12, 2006) 14

State v. Rideout, 933 A.2d 706 (Vt. 2007) 13

State v. Warren, 887 N.E.2d 1145 (Ohio 2008) 13

Sullivan v. State, 987 So. 2d 83 (Fla. 1st DCA 2008) 1, 6

Thomas v. State, Case No. 14-06-00066-CR, 2007 Tex. App. LEXIS 6212 (Tex. App. Aug. 7, 2007), cert. denied, 2008 U.S. LEXIS 6542 (Oct. 6, 2008) 13

United States v. Feemster, 483 F.3d 583 (8th Cir. 2007), vacated on other

grounds, 128 S. Ct. 880 (2008) 12

United States v. Mays, 466 F.3d 335 (5th Cir. La. 2006) 12

United States v. Pete, 277 Fed. Appx. 730, 734 (9th Cir. 2008) 12

United States v. Salahuddin, 509 F.3d 858 (7th Cir. 2007) 12

United States v. Wilks, 464 F.3d 1240 (11th Cir. Fla. 2006) 12

Van Pao Thao v. State, Case No. A07-2137, 2008 Minn. App. Unpub. LEXIS 1271 (Minn. Ct. App., Sept. 16 2008) 13

Wallace v. State, 956 A.2d 630 (Del. 2008) 13

In re Welfare of L.F.G.-L., Case No. A07-366, 2007 Minn. App. Unpub. LEXIS 1089 (Minn. Ct. App. Nov. 6, 2007) 13

Wills v. State, Case No. 06-04-00172-CR, 2005 Tex. App. LEXIS 7113 (Tex. App. Aug. 31, 2005) 13

Statutes and Rules

28 U.S.C. §1257 ..... v, 1, 2

28 U.S.C.§ 2244(a)(1)(A) 11

28 U.S.C.§ 2244(d)(1)(C) 11

Fla. Stat. § 39.02(c)(1987) 3

Fla. Stat. § 985.56 (2008) 3

Rule 10 Rules of the Supreme Court 10

Rule 3.850(b)(2) Fla. R. Crim. P. 9

No. 08-7621

IN THE
SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner, Joe Sullivan, seeks review of the decision of the District Court of Appeal, First District of Florida, affirming without opinion the denial of his state post conviction motion found at Sullivan v. State, 987 So.2d 83 (Fla. 1st DCA 2008).

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1257 of a per curiam affirmed decision of the District Court of Appeal, First District of Florida. In order to obtain review under 28 U.S.C. §1257, petitioner must show that the Florida Appellate Court was presented with and ruled upon the question raised in his

petition. However, the issue petitioner desires addressed was not ruled upon by the state court which dismissed his untimely state motion on state procedural grounds.

In interpreting its jurisdiction under § 1257, this Court has repeatedly rejected attempts to go beyond what was addressed by the state court. This Court has stated:

> With "very rare exceptions," Yee v. Escondido, 503 U.S. 519, 533, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. See Heath v. Alabama, 474 U.S. 82, 87, 88 L. Ed. 2d 387, 106 S. Ct. 433 (1985); Illinois v. Gates, 462 U.S. 213, 217-219, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 84 L. Ed. 849, 60 S. Ct. 670 (1940).

Adams v. Robertson, 520 U.S. 83, 86 (U.S. 1997); See also Campbell v. Louisiana, 523 U.S. 392, 402 (U.S. 1998). Because the state court dismissed the post conviction motion as untimely, it cannot be said that the Eighth Amendment claim that petitioner presents here has been properly presented and was ruled upon below. Therefore, this Court should deny review.

CONSTITUTIONAL PROVISION

Respondent accepts as accurate petitioner's statement regarding the constitutional provision petitioner desires this Court to review.

STATEMENT OF THE CASE AND FACTS

Joe Sullivan, a young recidivist, was arrested in 1989 and charged with two counts of sexual battery, two counts of burglary of a dwelling and one count of grand theft. An Escambia County grand jury indicted Sullivan for these offenses, thereby removing him from the state's juvenile system.[1] (R Vol III 256)

The facts of the case are straightforward. Sullivan and two other youths, Gulley and McCants, broke into an elderly woman's home. During this first burglary, the victim was not home. The testimony from Gulley was that during this burglary McCants took jewelry and coins.

Later the same day, Sullivan and Gulley returned to the home. On this occasion, a car was in the driveway. Gulley went to the front door and asked the elderly woman who answered the door about doing yard work. She declined the offer. Gulley testified that he ran from the scene when he observed the neighbor watching him.

The trial evidence showed that while Gulley was distracting the victim, Sullivan went to the other door and began to enter the home. The victim testified

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[1] Florida law mandates that a juvenile who is indicted for a felony punishable by life is to be treated as an adult. See § 39.02(c) Fla. Stat. (1987), currently § 985.56 Fla. Stat.(2008)

that she tried to prevent the entry. She testified that her assailant forced his way in and threw a black slip over her head. She testified that her assailant several times threatened to kill her but also stated that if she couldn't identify him he might not have to kill her. Sullivan took her to her bedroom removed her clothes, beat her, and raped her vaginally and orally. The victim testified she did as instructed by the assailant and did not try to look at him, thus she could not visually identify her assailant. However, after Sullivan said the "might not have to kill her" phrase, she testified that "there is a tone in the voice which makes me know its that person". (R Vol I 67-97, 88)

From the rape, the victim sustained bruising, a laceration to the vulva, and a vaginal tear which required surgery to repair. (R Vol I 81, 104-110)

Additionally, a neighbor, who had seen juveniles around the area earlier in the day, testified that when she saw the youth on the porch she tried calling the victim. When the victim did not answer her phone and the witness observed the tall youth still on the victim's porch, she called the police. The witness, Ms. Sobota, testified that after the police arrived she saw a different, shorter youth leave the house running, from the police. (R Vol I 49-57)

Officer Cutler, one of the first officers to arrive, testified that she stationed herself by the corner of the house. She testified she heard a neighbor yell and Cutler observed a young black male run from the front of the house. She testified he paused briefly and she saw his face. Officer Cutler identified Sullivan as the one who she saw running from the house, at the time of the rape offense. (R Vol I 111-

121)

Gulley also testified, that later that same day, he and McCants were at his home when the police came to talk to him. After the police discovered McCants had some of the missing items, they told the police what happened. Gulley further testified that while they were at the detention center, Sullivan told him that he had beaten and raped the woman. (R Vol I 157-173)

Police investigation revealed Sullivan's palm print was on a plaque found on the bed after the second incident. (R Vol I 175-186) Based on this evidence, the jury convicted Sullivan of a lesser included offense of count one and count five and as charged as to the remainder of the indictment.

On December 12, 1989, the trial court held a sentencing hearing. Mr. Sullivan chose not to speak regarding the punishment, however counsel made an argument in his behalf. The state pointed out that because of Sullivan's prior record, he scored 846 points, far exceeding the 583 points needed under the sentencing guidelines to impose a life sentence. The state during its argument highlighted two of Sullivan's prior offenses described in the presentence/predispositional report. One of these offenses, was a prior burglary where during the course of the burglary Sullivan killed a dog. The other involved an assault on his counselor at Lakeview. (R Vol III 266-273) The presentence/predispositional reports indicated Sullivan had been found guilty of seventeen criminal offenses in the prior two years including several serious felonies. The report also indicated that he had been previously committed to juvenile programs and described his adjustment as poor. The report reflected that, while at one

commitment facility, he was charged with two new law violations because he assaulted other clients. The reports recommended that adult sanctions be imposed. The trial court found that an adult sentence was appropriate and sentenced him to life in prison on the sexual batteries and imposed 30 year sentences on the burglaries. As to count five, Sullivan was sentenced to time served. (R Vol III 270-272) The state noticed an error as to the sentence on the burglaries and two days later the thirty year sentences were reduced to 15 years. (R Vol III 276-277) Sullivan filed an appeal of his conviction. After a complete review of the record, counsel filed an Anders[2] brief. Although given an opportunity, Sullivan did not file a pro-se brief.

In 1992, Mr. Sullivan filed a rule 3.850 state post conviction motion challenging his conviction. The first motion was dismissed and petitioner was allowed to refill another post conviction motion. The refilled motion was denied in 1996. (R 2007Rule 3.850 p 43) and Sullivan did not appeal.

Finally, on June 25, 2005, petitioner filed a state post conviction motion asserting that under Florida Law he was entitled to bring another post conviction motion because Roper v. Simmons, 543 U.S. 551 (2005), created a new constitutional right which applied to his case. The state trial court issued a written order in which the court first reviewed Florida's law on untimely and successive petitions and then evaluated whether Mr Sullivan qualified under any of Florida's exceptions to timeliness. The court determined that Sullivan did not qualify for any exception and

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[2] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)

dismissed the post conviction motion as untimely. (R 2007Rule 3.850 p 43) Sullivan appealed this decision to the District Court of Appeal, First District of Florida which affirmed the lower court without a written opinion. Sullivan v. State, 987 So.2d 83 (Fla. 1st DCA 2008)[3].

From this decision, which affirmed the dismissal of his state post conviction motion as untimely, petitioner filed this certiorari petition.

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[3] Sullivan did not seek review of this decision in Florida Supreme Court because the court does not have jurisdiction to review per curiam affirmed decisions of the District Courts of Appeal.

REASONS FOR DENYING THE WRIT

DID THE FLORIDA COURTS VIOLATE THE CONSTITUTION WHEN THEY APPLIED FLORIDA'S REGULARLY ENFORCED POST CONVICTION RULES AND DISMISSED SULLIVAN'S POST CONVICTION MOTION AS UNTIMELY?

In this petition for writ of certiorari, Sullivan contends that this Court should grant review of the decision of the District Court of Appeal, First District of Florida, which upheld the trial court's dismissal of petitioner's untimely and procedurally barred post conviction motion. Petitioner asserts that the decision of the Florida appellate court should be reviewed because the petitioner's sentence violates the Eighth Amendment.

Given the procedural posture of this case, petitioner's request is extraordinary. What Sullivan is asking this court to do is to treat his petition as if this Court was conducting a direct review of his conviction. However, this is not a direct review case, but a case involving review of the denial of a procedurally barred, state post conviction motion. Petitioner has not identified any post conviction case in which this Court has conducted a direct review. Thus, this Court should deny petitioner's certiorari request.

Additionally, this Court should deny certiorari review because petitioner is seeking review of a question which was not properly presented to and ruled upon by the state court. In this case, to have his claim addressed by the state court on the merits, petitioner had to meet one of Florida's exceptions to its regularly enforced procedural bars. The state court ruled that petitioner did not meet Florida's

threshold requirements to be heard on the merits and dismissed the motion. Thus, the Eighth Amendment issue petitioner articulates in this petition, was not properly presented to or ruled on by the state court. What petitioner is asking this Court to do is to ignore its long standing precedent by refusing to review matters which were not ruled upon by the state tribunal.

After this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), Sullivan returned to state court and filed a untimely and successive post conviction motion. Such motions can be entertained by the Florida Courts only when certain conditions exist. One basis for entertaining such motions is set out in Rule 3.850(b)(2) Fla. R. Crim. P. and allows a court to hear an untimely motion when:

> the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

In his state motion, petitioner asserted that Roper, established a new constitutional right that juveniles could not be sentenced to life in prison. The state court examined Roper, and how courts had interpreted Roper, and determined that Roper, did not establish the constitutional right asserted. Based on this determination, the court then dismissed the post conviction motion because it was procedurally barred. Because the motion was dismissed as untimely the court never considered the Eighth Amendment claim on the merits. Petitioner's argument ignores the fact that his claim did not meet Florida's requirements for hearing out of time claims and ignores the fact that the state court did not rule on whether the sentence imposed violated

the Eighth Amendment.[4]

If the Court were to examine the case further, the starting point for determining whether to grant certiorari is United States Supreme Court Rule Ten, which provides that certiorari will be granted only for compelling reasons. The rule indicates that in establishing compelling reasons, conflict between Circuit Courts of Appeal or State Supreme Courts on the point of law in question is essential.

Petitioner's problem is that he has not and can not point to any conflict between decisions of this Court, the Circuit Courts of Appeal, or State Supreme Courts on this issue. Florida' exceptions to its timeliness rule mirrors the timeliness

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[4]Petitioner asserts that his case is unique because he otherwise cannot obtain review. Failure to meet the timeliness rules under state law or in accordance with federal habeas law, thus limiting review, does not make his situation unique. In fact, it makes it rather ordinary as the reporters are littered with cases where defendants who have failed to meet timeliness requirements have been denied relief. Moreover, avenues still remain to correct miscarriages of justice. The Court stated in Herrera v. Collins, 506 U.S. 390, 412 (1993), that clemency is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."

Moreover, this Court rejected petitioner's uniqueness approach in Harmelin v. Michigan, 501 U.S. 957, 996 (U.S. 1991), where it stated:

> It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment with possibility of parole is also unique in that it is the third most severe. And if petitioner's sentence forecloses some "flexible techniques" for later reducing his sentence, see Locket, supra, at 605 (Burger, C. J.) (plurality opinion), it does not foreclose all of them, since there remain the possibilities of retroactive legislative reduction and executive clemency. In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment -- for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man. But even where the difference is the greatest, it cannot be compared with death. We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.

Harmelin, 501 U.S. at 996

exceptions in the Federal Habeas Statute. See 28 U.S.C.§ 2244(a)(1)(A) and 28 U.S.C.§ 2244(d)(1)(C). Several federal courts have interpreted how these provisions apply to individuals whom like Sullivan were juveniles when they received life sentences.

In Schane v. Cain, Case No. 07-1068, 2007 U.S. Dist. LEXIS 96538, *10-12 (W.D. La. Oct. 24, 2007), the district court stated:

> 28 U.S.C. §2244(d)(1)(C) - Newly recognized rights
>
> Petitioner, however, maintains that the limitations period should be reckoned as provided in §2244(d)(1)(C), from "... the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review ..." Thus, petitioner argues that the limitations period should be reckoned from March 1, 2005, the date the United States Supreme Court decided Roper v. Simmons, 543 U.S. 551, 125 S.C. 1183, 161 LED.2d 1 (2005).
>
> In order for petitioner to obtain the benefits of §2244(d)(1)(C), he must show that the constitutional right he asserts in this habeas corpus petition was newly recognized in Roper. In Roper, the newly recognized constitutional right was the abolition of the death penalty for minors, a claim not advanced by petitioner.
>
> Petitioner, although a minor at the time of the commission of the offense in question, was not sentenced to death and therefore the constitutional right recognized in Roper is clearly inapplicable. See In re Hill, 437 F.3d 1080, 1082 at fn. 1 (11th Cir. 2006); see also Culpepper v. McDonough, 2007 U.S. Dist. LEXIS 50866, 2007 WL 2050970 at *3 (M.D. Fla. 7/13/2007) ("Although Roper addresses a new and distinct constitutional right, the Roper decision is to be narrowly construed to include capital cases involving death sentences for minors. The constitutional claim in Roper sets a clear precedent by abolishing the execution of minors, but it does not particularly address the application of that constitutional claim to mandatory life sentences pertaining to minors."); Smith v. Howes, 2007 U.S. Dist. LEXIS 10061, 2007 WL 522697 at *2 (E.D. Mich. 2/14/2007) ("In Roper, the Supreme

> Court held that execution of individuals who were under 18 years of age at the time of their capital crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. Petitioner is not facing execution. Therefore ... Roper ... does not announce a constitutional right newly recognized by the Supreme Court which is relevant to Petitioner's case.").

Schane, 2007 U.S. Dist. LEXIS 96538, at 10-12

Likewise, in Sharikas v. Kelly, 2008 U.S. Dist. LEXIS 29153, 6-7 (E.D. Va. Apr. 7, 2008), the district court stated:

> Section 2244(d)(1)(C) delays the start of the limitations period, however, only for newly recognized constitutional rights that are retroactively applicable. In Roper, the Supreme Court held that the imposition of the death penalty upon individuals under 18 years of age at the time of their capital offense violates the Eighth Amendment's ban against cruel and unusual punishments. Roper, 543 U.S. at 568. Although Roper recognized a new constitutional right for juveniles sentenced to death prior to its issuance and that the ruling is retroactive on collateral review, by its very terms, Roper applies where an individual under the age of 18 is sentenced to death. In this case, petitioner was under 18 years of age at the time of his offenses, but was sentenced to terms of life imprisonment, not death. Accordingly, even if Roper were retroactively applicable, it did not announce a new constitutional right which is applicable to petitioner's case

Sharikas, 2008 U.S. Dist. LEXIS 29153, at 6-7 See also, Culpepper v. McDonough, 2007 WL 2050970, *4-5 (M.D. Fla. July 13, 2007); Smith v. Howes, Case No. 06cv10905, 2007 WL 522697, *2 (E.D. Mich. Feb 14, 2007); Douma v. Workman, 2007 WL 2331883, *3 (N.D. Okla. 2007).

Thus, the federal courts, applying the equivalent timeliness exception, came to the exact same result as the state courts, finding the claims untimely. Thus, Sullivan has identified no conflict and no basis for this Honorable Court to exercise Certiorari

Jurisdiction in this case.[5]

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[5] In addition to the lack of conflict regarding the threshold procedural issue, Petitioner cannot establish conflict on the merits of whether the holding in Roper extends outside the death penalty context. Rather, the courts that have considered the applicability of Roper to a juvenile's term of life imprisonment have universally decided the issue *against* Petitioner's position. See United States v. Pete, 277 Fed. Appx. 730, 734 (9th Cir. 2008); United States v. Feemster, 483 F.3d 583, 588 (8th Cir. 2007), vacated on other grounds, 128 S. Ct. 880 (2008); United States v. Salahuddin, 509 F.3d 858 (7th Cir. 2007); United States v. Mays, 466 F.3d 335, 339 (5th Cir. La. 2006), United States v. Wilks, 464 F.3d 1240, 1242 (11th Cir. Fla. 2006), Calderon v. Schribner, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009); Culpepper v. McDonough, 2007 WL 2050970, *4–5 (M.D. Fla. July 13, 2007); Douma v. Workman, 2007 WL 2331883, *3 (N.D. Okla. 2007); Pineda v. Leblanc, Case No. 07-3598, 2008 WL 294685, *3 (E.D. La. Jan. 31, 2008); Price v. Cain, Case No. 07-937, 2008 U.S. Dist. LEXIS 23474, *17–23 (W.D. La. March 4, 2008); Byrd v. Quarterman, Case No. 3:08cv1414b, 2008 WL 4427265, *2 (N.D. Tex. Sept. 26, 2008); Schane v. Cain, Case No. 07-1068, 2007 U.S. Dist. LEXIS 96538, *10–12 (W.D. La. Oct. 24, 2007); cf. Smith v. Howes, Case No. 06cv10905, 2007 WL 522697, *2 (E.D. Mich. Feb. 14, 2007) (finding *Roper* inapplicable to juvenile sentenced to thirty to sixty years in prison), Sharikas v. Kelly, 2008 U.S. Dist. LEXIS 29153 (E.D. Va. Apr. 7, 2008).

State court decisions are in accord. See Connell v. State, Case No. CR-06-0668, 2008 Ala. Crim. App. LEXIS 108, *10 (Ala. Crim. App. May 30, 2008); People v. Metzger, Case No. B198096, 2008 Cal. App. Unpub. LEXIS 10492, *27–28 (Cal. Ct. App. Dec. 29, 2008); People v. Diaz, Case No. F052637, 2008 Cal. App. Unpub. LEXIS 10351, *13–17 (Cal. Ct. App. Dec. 22, 2008); People v. Demirdjan, 50 Cal. Rptr. 3d 184, 186–87 (Cal. App. Ct. 2006); State v. Allen, 958 A.2d 1214, 1233–36 (Conn. 2008); Wallace v. State, 956 A.2d 630, 638–41 (Del. 2008); Culpepper v. State, 971 So. 2d 259, 260–61 (Fla. 2d DCA 2008); People v. Griffin, 857 N.E.2d 889, 899 (Ill. App. Ct. 2006); Sims v. Commonwealth, 233 S.W.3d 731, 732–33 (Ky. Ct. App. 2007); Gussler v. Commonwealth, 236 S.W.3d 22, 23–24 (Ky. Ct. App. 2007); Van Pao Thao v. State, Case No. A07-2137, 2008 Minn. App. Unpub. LEXIS 1271, *11 n.3 (Minn. Ct. App., Sept. 16 2008); In re Welfare of L.F.G.-L., Case No. A07-366, 2007 Minn. App. Unpub. LEXIS 1089, *9–10 (Minn. Ct. App. Nov. 6, 2007); State v. Medina, 622 S.E.2d 176, 182 (N.C. Ct. App. 2005); State v. Warren, 887 N.E.2d 1145, 1149 (Ohio 2008); State v. Bunch, Case No. 06-MA-106, 2007 Ohio 7211, 2007 Ohio App. LEXIS 6314, **11–12 (Ohio Ct. App. Dec. 21, 2007); Thomas v. State, Case No. 14-06-00066-CR, 2007 Tex. App. LEXIS 6212, *15–19 (Tex. App. Aug. 7, 2007), cert. denied, 2008 U.S. LEXIS 6542 (Oct. 6, 2008); State v. Ridcout, 933 A.2d 706, 718-19 (Vt. 2007); see also Cobos v. Dennison, 825 N.Y.S.2d 332 (N.Y. Sup. Ct., App. Div. 2006); State v. Avery, 649 S.E.2d 102, 108 (S.C. Ct. App. 2007); Gurerro v. State, Case No. 13-05-00709-CR, 2008 Tex. App. LEXIS 1837, *4–8 (Tex. Crim. App. March 13, 2008); Wills v. State, Case No.

Thus, Petitioner has failed to present any compelling reason for this Court to grant certiorari. The Florida Court determined that Sullivan failed to meet its established basis for having an untimely post conviction motion heard. Other federal and state courts are in accord. Therefore, Respondent urges this Court to deny certiorari.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny petitioner's request for certiorari review.

Respectfully Submitted,

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06-04-00172-CR, 2005 Tex. App. LEXIS 7113, *7-8 (Tex. App. Aug. 31, 2005); State v. Ocak, Case No. 56006-9-I, 2006 Wash. App. LEXIS 1126, *2 (Wash. Ct. App. June 12, 2006).

No. 08-7621

IN THE SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN, *Petitioner*,

vs.

STATE OF FLORIDA, *Respondent*.

RESPONDENT'S PROOF OF SERVICE

Comes now Respondent, by and through counsel, and hereby certifies that pursuant to United States Supreme Court Rule 29, a true and correct copy of Respondent's Brief In Opposition was mailed, postage prepaid on this 20th day of March, 2008, to opposing counsel , as designated below:

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REPLY BRIEF

(29)

No. 08-7621

IN THE SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN, Petitioner,

v.

STATE OF FLORIDA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Joe Sullivan's Juvenile History. 2

B. Joe Sullivan's Unreliable Trial and Conviction. 3

C. The State's Argument That a Sixth-Grader Must File a Pro Se Brief to Preserve Constitutional Issues Highlights the Need for Constitutional Protection of a 13-Year-Old Facing Death in Prison. 7

ARGUMENT 8

I. The State Concedes That the State-Court Judgment Rests on a Threshold Determination of Federal Constitutional Law. 9

II. This Case Presents Compelling Grounds for a Grant of Certiorari. 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 10

Anders v. California, 386 U.S. 738 (1967) 7

Davis v. Alaska, 415 U.S. 308 (1974) 5

Fla. Bar v. Plant, 848 So. 2d 1156 (table) (Fla. 2003) 4

Fla. Bar, In re Plant, 728 So. 2d 205 (table) (Fla. 1998) 4

Fla. Bar v. Plant, 699 So. 2d 1376 (table) (Fla. 1997) 4

Fla. Bar v. Plant, 698 So. 2d 1226 (table) (Fla. 1997) 4

In re Gault, 387 U.S. 1 (1967) 2

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 2

Ohio v. Reiner, 532 U.S. 17 (2001) 1

Roper v. Simmons, 543 U.S. 551 (2005) 1, 8, 10, 12

RULES AND STATUTES

28 U.S.C. § 1257 1

Fla. Stat. Ann. § 90.104 (West 1989) 7

Fla. Stat. Ann. § 985.565 2

Sup. Ct. R. 10 11

Fla. Rule Crim. P. 3.850 9

MISCELLANEOUS

Florida Bar Online, http://www.floridabar.org/ 4

Florida Department of Corrections, http://www.dc.state.fl.us/InmateReleases 4

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Mr. Sullivan presented an argument in state court that, under Roper v. Simmons, 543 U.S. 551 (2005), the Eighth Amendment requires the State to engage in a distinct constitutional analysis before imposing an extreme sentence on a thirteen-year-old child. The Florida courts discussed Mr. Sullivan's federal constitutional argument and rejected it. *Based on this determination of federal law*, the courts dismissed Mr. Sullivan's claim under a state procedural bar. Because the state-court judgment depends on resolution of a "right . . . claimed under the Constitution . . . [of] the United States," 28 U.S.C. § 1257(a), jurisdiction is proper in this Court. Id.[1]

STATEMENT OF THE CASE

The State's brief in opposition does not dispute any of the operative facts affecting Mr. Sullivan's constitutional claim, including that: (1) Joe Sullivan was thirteen when the underlying crime was committed; (2) the crime was a non-homicide; and (3) only two people

[1]The State appears to argue, to the contrary, that this Court lacks jurisdiction over Mr. Sullivan's petition because the state court based its ruling on an independent and adequate state ground. The State cannot help but acknowledge, however, that the state-court ruling is based on a threshold consideration of the federal constitutional questions presented below and in the instant Petition. (See Resp't's Br. Opp'n 9.) This Court repeatedly has held that where application of a state procedural bar "rests, as a threshold matter, on a determination of federal law," the state-law bar provides no obstacle to this Court's review. Ohio v. Reiner, 532 U.S. 17, 20 (2001) (per curiam).

in the United States have been sentenced to die in prison for a non-homicide offense committed at the age of thirteen. (Pet. Cert. 2, 26–28.) Nor does the State dispute that thirteen-year-olds have constitutionally significant psychosocial and neurological differences from older teens and adults, (id. at 29–32), or that the law treats thirteen-year-olds differently from older teens and adults. (Id. at 21–23).

A. Joe Sullivan's Juvenile History.

The State mischaracterizes Joe's juvenile history,[2] apparently to suggest that his death-in-prison sentence is less troubling. A review of the record, however, actually supports the opposite conclusion. Joe was thirteen years old when this crime took place. He had no encounters with the juvenile justice system until his family disintegrated into what state officials described as "abuse and chaos." (Presentence Investigation Report, Dec. 12, 1989, at 7.) During this period Joe lived in ten different residences in three years. (Id.) He began spending time on the streets, where he picked up twelve misdemeanors, mostly trespassing, stealing a bike, or property crimes committed with his older brother and older teens. (Predisposition Report, Dec. 11, 1989, at 1–3.) These misdemeanors make up the bulk of his

---

[2]It is worth noting that these adjudications of delinquency are *not* criminal convictions. See Fla. Stat. Ann. § 985.565 ("Adjudication of delinquency shall not be deemed a conviction . . . ."). As such, Florida was not required to afford Joe all the procedural safeguards that attend a criminal trial. See McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971) (plurality opinion) (no right to jury trial in juvenile adjudication because not entitled to all constitutional protections afforded in criminal prosecution); In re Gault, 387 U.S. 1, 30 (1967) ("We do not mean to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing."). This Court previously has noted that such informality can lead to less reliable determinations of guilt because the goal of the juvenile justice system is treatment rather than punishment. See Gault, 387 U.S. at 18–24, 44–45 (describing problems in the juvenile justice system's informal adjudication system).

juvenile history. (Guideline Scoresheet, Dec. 12, 1989, at 1.)

Joe's only serious prior offense occurred when he was twelve. (Predisposition Report, at 2.) He and his older brother broke into a house, and, when they unexpectedly were set upon by a dog, Joe hit the dog in the head, accidentally killing it. (Id.) This incident alone accounted for nearly two-thirds of the criminal history points assessed at sentencing. (Guideline Scoresheet, at 1.) The assault referred to by the State actually was a misdemeanor that caused no injury. (Predisposition Report, at 1.)

Joe's adjustment under juvenile supervision "initially was great for the first few months." (Id. at 4.) The juvenile probation officer who prepared the predisposition report attributed Joe's behavior to the fact that "he is easily influenced and associates with the wrong crowd." (Id.) She noted that "[i]t is apparent that Joe is a very immature naive person who is a follower rather than a leader," and that he had the potential to "be a positive and productive individual." (Id.)

B. Joe Sullivan's Unreliable Trial and Conviction.

In its brief in opposition, the State suggests that the case against Joe Sullivan was compelling and the adjudication of guilt reliable. (See Resp't's Br. Opp'n 3-6.) The record belies this characterization.

Joe was tried by a six-person jury in a one-day proceeding; opening statements began sometime after 9 a.m., and the jury returned its verdict at 4:55 p.m. (See Trial Tr. 30, 250.) During trial, the prosecutor and witnesses made repeated, unnecessary reference to the race

of both the accused (African American) and the victim (white), (R. 6, 19; see, e.g., Trial Tr. 44, 47, 64, 165, 171), and a witness repeatedly referred to the perpetrator of the assault as a "colored boy" or "a dark colored boy." (Trial Tr. 76, 97.) The biological evidence that had been collected was not presented at trial and was destroyed before it could be subjected to DNA testing. (R. 6, 18–19.) Joe's appointed counsel—who was later suspended from practice in Florida and never reinstated[3]—spent limited time on the case. (Mot. Att'y's Fee, filed Dec. 13, 1989.)

There was no dispute that Joe had participated, along with two older teens—Nathan McCants, seventeen at the time, and Michael Gulley, fifteen at the time[4]– in a burglary of the victim's unoccupied home on the morning of May 4, 1989. Joe admitted as much at trial. (Trial Tr. 192–94.) Nor was there a dispute that, later in the day, someone returned to the victim's home and sexually assaulted her. The victim, however, was blindfolded during the entire attack, (Trial Tr. 97), and could not identify her attacker. The central question at trial, therefore, was whether the State could prove that Joe Sullivan was that attacker.

Within minutes of the assault, Gulley and McCants were apprehended nearby,

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[3]See Fla. Bar v. Plant, 698 So. 2d 1226 (table) (Fla. 1997) (inactive status); Fla. Bar v. Plant, 699 So. 2d 1376 (table) (Fla. 1997) (public reprimand); Fla. Bar, In re Plant, 728 So. 2d 205 (table) (Fla. 1998) (reinstatement denied); Fla. Bar v. Plant, 848 So. 2d 1156 (table) (Fla. 2003) (suspended); see also Florida Bar Online, http://www.floridabar.org/ (click "Find a Member" and search last name: Plant, first name: Mack).

[4]Co-defendants' ages are based on information from the Florida Department of Corrections web site, available at http://www.dc.state.fl.us/InmateReleases.

together.[5] (Trial Tr. 48–49, 142.) When arrested, McCants was in possession of jewelry belonging to the victim. (Trial Tr. 124.) Gulley's pretrial deposition revealed that he had an extensive criminal history involving at least one sexual offense.[6] (Dep. of Michael Gulley, Nov. 2, 1989, at 38–41.) Nevertheless, the State proceeded to trial on a theory that it was Gulley and Joe Sullivan who returned to the victim's house for a second time, and that Joe committed the sexual assault.

The actual evidence purporting to identify Joe as the perpetrator of the sexual assault, however, was quite tenuous: (1) self-serving stories of McCants and Gulley (who both received juvenile sentences for their roles in the crimes, (R. 6, 18)), including Gulley's claim that Joe confessed the rape to him in a detention facility before trial, (see Trial Tr. 168); (2) evidence of a match between Joe's left palm-print and a latent print lifted from a plaque in the victim's bedroom, which at best established Joe's admitted presence in the bedroom at an earlier time, (Trial Tr. 186); (3) a tainted identification by a police officer,[7] which at best established Joe's presence outside the house; and (4) an in-court voice identification by the victim, proposed and conducted for the first time by the State on the day of trial, (Trial Tr.

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[5]Joe Sullivan, by contrast, was not apprehended on the day of the crime, but was picked up the next day, after Gulley and McCants implicated him. (See Trial Tr. 47, 120.)

[6]The record does not reflect McCants's prior criminal history. Defense counsel failed to impeach Gulley or McCants with prior juvenile adjudications at trial. Cf. Davis v. Alaska, 415 U.S. 308, 319 (1974) (defendant has constitutional right to confront State witness with prior juvenile adjudications).

[7]On the day of the assault, the officer got a "glimpse," (Trial Tr. 118), of an African-American youth fleeing the victim's house. The next day, the officer observed Joe while he was at the police station being interrogated as a suspect in the sexual assault. (Trial Tr. 120.) Under these suggestive circumstances, the officer identified Joe as the fleeing youth. (Id.)

37).

The victim, who previously had been unable to identify her attacker, was allowed to identify Joe as the attacker at trial based on a highly suggestive and unreliable voice-identification procedure. (Trial Tr. 84–91.) A dry run of this procedure outside of the presence of the jury revealed the unreliable nature of the identification.[8] Nonetheless, the witness was allowed to repeat the identification, in a more polished and confident form, in front of the jury.[9] (Trial Tr. 90-91.)

After Joe's conviction, counsel filed no written pleadings, and his oral presentation at sentencing does not exceed twelve lines of transcript. (Trial Tr. 267.)

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[8]The following excerpt from the proffer outside of the presence of the jury demonstrates the unreliability of the procedure. After Joe was forced to repeat the words used by the attacker, the witness testified:

The Witness:	It sounds – there's a tone in your voice that's just like that, only **you said it very loud to me that time** in a belligerent way.
[Prosecutor]:	I don't want to argue about it. Are you able to say that's the voice of the person?
The Witness:	There's a tone in that voice that makes me know its that person.
[Prosecutor]:	So you are saying the person who just spoke to you is the person that said that to you that day?
The Witness:	**It sounds like the voice.**
[Prosecutor]:	All right.
The Witness:	It's been six months. **It's hard, but it does sound similar.** But it's said in a different way. See, the tone – it was said to me very belligerent in a loud voice.

(Trial Tr. 87-88 (emphasis supplied); see also Trial Tr. 91 ("A: He has a deep voice, and there's a tone in it like the – like as well as I remember. Q: Does it sound like the voice? A: It could very easily be.").)

[9]Defense counsel objected, but only on the clearly nonmeritorious ground that the Fifth Amendment barred the compelled production of a voice exemplar—not on the clearly *meritorious* ground that the identification procedure was unduly suggestive, unreliable, and highly prejudicial. (See Trial Tr. 37, 84–85.)

C. The State's Argument That a Sixth-Grader Must File a Pro Se Brief to Preserve Constitutional Issues Highlights the Need for Constitutional Protection of a 13-Year-Old Facing Death in Prison.

Despite the various trial errors and infirmities described above—by no means an exhaustive listing—Joe's appointed appellate defender, inexplicably, filed an Anders brief,[10] and the Florida First District Court of Appeal, inexplicably, accepted it. (See Pet. Cert. 6 & n.8.)

The State suggests that the absence of any appellate review in this case is acceptable because Joe was "given an opportunity . . . [to] file a pro se brief." (Resp't's Br. Opp'n 6.) Joe Sullivan was thirteen when he was arrested. He had completed sixth grade but read at only a first-grade level. (Presentence Investigation Report, Dec. 12, 1989, at 5, 7). He was fourteen when the State suggests he should have filed a pro se brief to preserve the issues presented here.

Indeed, the suggestion that the State's failure to provide reliable trial and sentencing proceedings can be cured by providing a mentally challenged sixth-grader the "opportunity" to file a pro se brief only underscores the State of Florida's general failure to acknowledge the basis for Mr. Sullivan's petition—that the developmental and practical gulf separating thirteen- and fourteen-year-old children from older teens and adults requires a distinct constitutional analysis before imposition of a sentence of life imprisonment without parole.

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[10]See Anders v. California, 386 U.S. 738 (1967). It should be noted that, at the time, as now, Florida law allowed appellate courts to review unpreserved trial errors for plain error. See Fla. Stat. Ann. § 90.104(3) (West 1989).

ARGUMENT

Joe Sullivan was sentenced to life imprisonment without possibility of parole for a non-homicide offense committed at age thirteen. Petitioner contends that the Eighth Amendment establishes that, for children, age has a distinct constitutional meaning for certain serious sentences and consequently some sentences may be unconstitutional when imposed on a young child even though the same sentence may be permissible for an older teen or an adult. Petitioner argues here and argued below that Roper v. Simmons, 543 U.S. 551 (2005), makes this clear, and he argued that the Eighth Amendment requires an inquiry into the constitutionality of sentencing a thirteen-year-old child to die in prison. That inquiry compels the conclusion that Joe's youth at the time of the crime categorically shields him from being sentenced to die in prison. The Florida courts erroneously applied federal constitutional law when they rejected Joe's Eighth Amendment claim without even engaging in the required inquiry.

In his Petition, Mr. Sullivan explains that: (1) the federal constitutional claim presented to, and summarily rejected by, the Florida courts is of extraordinary importance; (2) the nature of the claim—unconstitutional imposition of a freakishly rare sentence—means that, by definition, this Court will have few opportunities to review it; (3) the purported state procedural bar does not preclude this Court's review, because the state-court decision was premised expressly on a threshold evaluation of the federal constitutional issue; and (4) the state courts failed to conduct a proper Eighth Amendment analysis and thus reached the

wrong conclusion. (See Pet. Cert. 9–11, 18.)

The State's brief in opposition fails to rebut these arguments. Therefore, for all the reasons stated in the Petition, as well as the reasons stated below, this Court should grant certiorari review in this case.

I. The State Concedes That the State-Court Judgment Rests on a Threshold Determination of Federal Constitutional Law.

In his Petition, Mr. Sullivan argues that no independent and adequate state-law ground precludes this Court's review, because the state-court decision was premised expressly on a threshold evaluation of the underlying federal constitutional claim. (See Pet. Cert. 10, 18.) The State's brief in opposition repeatedly references "state procedural grounds" and "timeliness rules" as the basis for the state-court judgment, (Resp't's Br. Opp'n 2, 10 n.4), but ultimately the State's own brief acknowledges that, in fact, the state procedural ruling is predicated on an analysis of the merits of Joe's Eighth Amendment claim. (Id. at 9 ("Based on this determination [of the federal constitutional claim], the court then dismissed the post conviction motion because it was procedurally barred.").)

The purported state procedural ground of decision is that Mr. Sullivan's motion for postconviction relief was time-barred. As the brief in opposition itself recites, however, Florida's applicable statute of limitations contains exceptions, one of which "allows a court to hear an untimely motion when: 'the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.'" (Id. (quoting Fla. R. Crim. P. 3.850(b)(2)).) Mr. Sullivan argued to the Florida courts that

the federal Eighth Amendment right he asserted was established by Roper v. Simmons, and that his Roper-based claim was timely filed following this Court's decision in Roper. The Respondent concedes that:

> The state court examined Roper, and how courts had interpreted Roper, and determined that Roper *did not establish the constitutional right asserted. Based on this determination*, the court dismissed the post conviction motion because it was procedurally barred.

(Resp't's Br. Opp'n 9 (emphasis added).) Since the application of the procedural bar depended squarely upon the Florida courts' examination and interpretation of the substantive constitutional holding of Roper and a determination that Roper "did not establish" the right claimed by Mr. Sullivan, this procedural ruling was not an adequate and *independent* state-law ground of decision. Ake v. Oklahoma, 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.").

Simply put, Joe contended in state court that he was entitled to have the distinct analysis laid out in Roper applied to his case. The state courts disagreed with Joe as to the scope and application of Eighth Amendment law, and they denied relief. This Court can and should take jurisdiction to correct the state courts' erroneous judgment and interpretation of federal constitutional law.

None of the cases cited in the State's brief in opposition changes this conclusion. Each engages in the same threshold, cursory analysis of federal law as Florida did here, and

none involves a sentence of life without parole imposed on a thirteen-year-old for a non-homicide. The fact that a handful of district courts have made errors similar to Florida's does not obviate the necessity for this Court's review.

II. This Case Presents Compelling Grounds for a Grant of Certiorari.

The second contention in the State's brief in opposition is that this Court should decline jurisdiction because the decision of the Florida courts does not conflict with decisions of the United States courts of appeal, state courts of last resort, or this Court on the underlying constitutional issue. (Resp't's Br. Opp'n 10.) This point treats the illustrations of potentially certiorari-worthy cases in subparagraphs (a) and (b) of this Court's Rule 10 as the full measure of the Court's certiorari discretion, in disregard of the plain terms of the Rule. See Sup. Ct. R. 10(c) (listing, as reason for granting certiorari review, that "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court"); see also Sup. Ct. R. 10 ("The following [subparagraphs], although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . . .").

Moreover, in forty-six states there are no reported cases of thirteen-year-old children being sentenced to death in prison. In the great majority of states, such a sentence is not permitted by law. There are only two identifiable instances, both in Florida, where a thirteen-year-old child had been sentenced to life without parole for a non-homicide. Condemning a thirteen-year-old child to life imprisonment with no chance of parole for a non-homicide

is precisely the kind of exceptionally rare and extreme sentence that requires review by this Court to assess whether the Eighth Amendment's cruel-and-unusual prohibition applies.

Florida's third point is a variant of its second point. It is that the lower courts "have universally decided the issue [of Roper's implications for the constitutionality of sentencing children to die in prison with no possibility of parole] *against* Petitioner's position." (Resp't's Br. Opp'n 13 n. 5.) But it is precisely because the lower courts appear to be locked into a narrow and mechanistic reading of Roper, ignoring its rationale and its logical implications for even the most severe and unforgiving sentence short of immediate death, that this Court's consideration of the proper scope of Roper's Eighth Amendment reasoning is warranted.

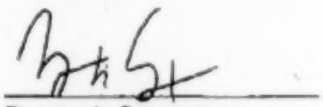
No case has addressed the constitutionality of sentencing a thirteen-year-old child to die in prison for a non-homicide offense. The fact that the State cannot cite to a single similar case highlights the extreme rarity of Joe's sentence.

In sum, although it cites a laundry list of inapposite cases, the State does not, and cannot, argue that the underlying question—whether the Eighth and Fourteenth Amendments prohibit imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide—is unworthy of this Court's attention.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court grant a writ of certiorari to the District Court of Appeal of Florida for the First District and declare that his rights were violated.

Respectfully submitted,



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March 30, 2009

JOINT APPENDIX

133

(2)

No. 08-7621

Supreme Court, U.S.
FILED
JUL 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed December 4, 2008
Certiorari Granted May 4, 2009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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TABLE OF CONTENTS

Page

Docket of the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, No. 1989 CF 002693 A 1

Docket of the Florida First District Court of Appeal, No. 1D07-6433 18

Motion for Postconviction Relief, filed in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida on July 24, 2007 21

Memorandum of Law in Support of Motion for Postconviction Relief, filed in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida on July 24, 2007 35

Order Dismissing with Prejudice Defendant's Motion for Postconviction Relief, Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, filed November 2, 2007 54

Opinion of the Florida First District Court of Appeal, dated June 17, 2008 73

Order of the Florida First District Court of Appeal denying rehearing, rehearing en banc, and certification, dated August 6, 2008 74

Mandate of Florida First District Court of Appeal, dated August 22, 2008 75

Order of the United States Supreme Court granting certiorari and permission to proceed *in forma pauperis*, dated May 4, 2009 76

**IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT IN AND FOR
ESCAMBIA COUNTY, FLORIDA**

**Case No.: 1989 CF 002693 A
STATE OF FLORIDA VS.
SULLIVAN, JOE HARRIS**

DOCKET

No.	Date	Description
1	05/23/1989	JUDGE: COLLIER
2	05/23/1989	INDICTMENT FILED
3	05/23/1989	CAPIAS ISSUED, RETURNABLE 5-25-89: NO BOND
4	05/25/1989	JUDGE: COLLIER
5	05/25/1989	ASSISTANT STATE ATTORNEY: G. MARCILLE
6	05/25/1989	PUBLIC DEFENDER APPOINTED: E. KILLAM
7	05/25/1989	PLED NOT GUILTY. SET FOR JURY TRIAL: 7-31-89 DD 7-25-89
8	05/25/1989	COURT REPORTER: DB
9	05/30/1989	AFFIDAVIT OF INSOLVENCY FILED
10	06/27/1989	JUDGE: GEEKER
11	06/27/1989	MOTION TO WITHDRAW FILED.

12	06/27/1989	ORDER GRANTING MTN TO W/DRAW & APPT: M. PLANT
13	06/29/1989	ANSWER TO DEMAND FOR DISCOVERY FILED
14	07/25/1989	JUDGE: GEEKER
15	07/25/1989	ASSISTANT STATE ATTORNEY: D. CLARK
16	07/25/1989	ASSISTANT PUBLIC DEFENDER: T. TERRELL
17	07/25/1989	RESET FOR JURY TRIAL: 8-28-89, D. DAY 8-22-89 REQUEST DEFENSE
18	08/22/1989	JUDGE: GEEKER
19	08/22/1989	ASSISTANT STATE ATTORNEY: L. KADEN
20	08/22/1989	M. PLANT, ATTORNEY
21	08/22/1989	RESET FOR JURY TRIAL: 10/2/89, DD 9/26/89 REQUEST DEFENSE.
22	08/22/1989	COURT REPORTER: BFS
23	09/25/1989	AMENDED ANSWER TO DISCOVERY FILED
24	09/27/1989	FILE WITNESS LIST
25	09/27/1989	FILE MOTION FOR CONTINUANCE
26	10/02/1989	JUDGE: GEEKER
27	10/02/1989	ASSISTANT STATE ATTORNEY: L. KADEN

28	10/02/1989	COURT APPOINTED ATTORNEY: M. PLANT
29	10/02/1989	COURT REPORTER: E. UNDERWOOD
30	10/02/1989	RESET FOR JURY TRIAL: 11-13-89, D DAY 11-7-89
31	10/19/1989	JUDGE: GEEKER
32	10/19/1989	FILE MOTION & ORDER TO TRANSCRIBE DEPOSITIONS
33	10/19/1989	FILE NOTICE OF ALIBI
34	10/31/1989	JUDGE: GEEKER
35	10/31/1989	FILE MOTION & ORDER FOR TELEPHONIC DEPOSITION OF A WITNESS IN
36	10/31/1989	PRISON
37	11/02/1989	FILE MOTION TO EXPEDITE TRANSCRIPTION OF DEPOSITIONS
38	11/03/1989	FILE PETITION FOR WRIT OF HABEAS CORPUS
39	11/06/1989	FILE DEPOSITIONS OF PAM HARRIS & DUSTY CUTLER
40	11/09/1989	FILE SECOND WITNESS LIST

41	11/15/1989	AMENDED ANSWER TO DISCOVERY FILED
42	11/15/1989	AMENDED ANSWER TO DISCOVERY FILED
43	11/16/1989	JUDGE: GEEKER
44	11/16/1989	ASSISTANT STATE ATTORNEY: L. KADEN
45	11/16/1989	COURT APPOINTED ATTORNEY: M. PLANT, CAA
46	11/16/1989	DEFENDANTS MOTION TO EXCLUDE WITNESS DENIED.
47	11/16/1989	JURY SWORN
48	11/16/1989	JURY TRIAL HELD
49	11/16/1989	DEFENDANTS MOTION FOR JUDGEMENT OF ACQUITTAL DENIED.
50	11/16/1989	FOUND GUILTY AS CHARGED OF CT. 2, CT. 3, CT. 4.
51	11/16/1989	FOUND GUILTY OF BURGLARY OF DWELLING UNDER CT. 1
52	11/16/1989	FOUND GUILTY OF PETIT THEFT UNDER CT. 5.
53	11/16/1989	JURORS POLLED
54	11/16/1989	AT DEFENDANTS REQUEST.

55	11/16/1989	DEFENDANT REMANDED TO CUSTODY.
56	11/16/1989	PRE-DISPOSITION REPORT REQUESTED, RETURNABLE: 12/12/89 @ 1:30.
57	11/16/1989	PRE-SENTENCE INVESTIGATION RETURNABLE: 12/12/89 @ 1:30 PM.
58	11/16/1989	FILE STATES EXHIBIT A, B, AND C (RECORD PURPOSE ONLY).
59	11/16/1989	FILE EXHIBITS.
60	11/16/1989	FILE VERDICT.
61	11/16/1989	COURT REPORTER: JB
62	12/05/1989	JUDGE: GEEKER
63	12/05/1989	FILE MOTION & ORDER FOR PAYMENT OF COSTS
64	12/05/1989	JUDGE: GEEKER
65	12/05/1989	FILE MOTION & ORDER FOR PAYMENT OF EXPERT WITNESS FEE
66	12/05/1989	FINAL DISPOSITION AS FOLLOWS:
67	12/12/1989	JUDGE: GEEKER
68	12/12/1989	ASSISTANT STATE ATTORNEY: L. KADEN

69	12/12/1989	COURT APPOINTED ATTORNEY: M. PLANT
70	12/12/1989	COURT REPORTER: GBS
71	12/12/1989	ADJUDGED GUILTY: CT. 1, CT. 2, CT. 3, CT. 4, & CT. 5
72	12/12/1989	STATE PRISON: 30 YEARS UNDER CT. 1 WITH CREDIT FOR 204 DAYS.
73	12/12/1989	STATE PRISON: LIFE IMPRISONMENT UNDER CT. 2 AND
74	12/12/1989	SENTENCE CONCURRENT WITH: CT. 1, WITH CREDIT FOR 204 DAYS.
75	12/12/1989	STATE PRISON: LIFE IMPRISONMENT UNDER CT. 3 AND
76	12/12/1989	SENTENCE CONCURRENT WITH: CT. 1 WITH CREDIT FOR 204 DAYS.
77	12/12/1989	STATE PRISON: 30 YEARS UNDER CT. 4 WITH CREDIT FOR 204 DAYS &
78	12/12/1989	SENTENCE CONCURRENT WITH: CT. 1.
79	12/12/1989	CT. 5: SENTENCED TO TIME SERVED.

80	12/12/1989	DEFENDANT TO MAKE RESTITUTION AS DETERMINED BY PROBATION AND
81	12/12/1989	PAROLE. FILE ORDER FINDING DEFT SUITABLE FOR ADULT SANCTIONS
82	12/12/1989	AND NONSUITABLE FOR DISPOSITION AS CHILD. FILE GUIDELINES.
83	12/12/1989	JUDGMENT AND SENTENCE FILED
84	12/12/1989	DEFENDANT ADVISED OF RIGHT TO APPEAL
85	12/14/1989	JUDGE: GEEKER
86	12/14/1989	ASSISTANT STATE ATTORNEY: L. KADEN
87	12/14/1989	COURT APPOINTED ATTORNEY: M. PLANT
88	12/14/1989	COURT REPORTER: BFS
89	12/14/1989	SENTENCE UNDER CTS. 1 & 4 VACATED & SET ASIDE.
90	12/14/1989	15 YEARS UNDER CTS 1 & 4 EACH COUNT CONCURRENT AND
91	12/14/1989	SENTENCE CONCURRENT WITH: CTS. 2, 3 & 5
92	12/15/1989	JUDGE: GEEKER

93	12/15/1989	FILE MOTION & ORDER GRANTING $2180.00 ATTORNEYS FEES & $47.86
94	12/15/1989	COSTS TO M. PLANT
95	01/10/1990	NOTICE OF APPEAL FILED
96	01/12/1990	STATEMENT OF JUDICIAL ACTS TO BE REVIEWED FILED
97	01/12/1990	FILE DESIGNATION TO COURT REPORTER.
98	01/17/1990	JUDGE: NICKOLAS P. GEEKER
99	01/17/1990	MOTION FOR/TO: APPOINTING SUBSTITUTE COUNSEL.
100	01/17/1990	ORDER: APPOINTING SUBSTITUT COUNSEL, PUBLIC DEFENDER, FIRST
101	01/17/1990	JUDICIAL CIRCUIT.
102	01/17/1990	NOTICE OF APPEAL & ORDER OF INSOLVENCY MAILED TO DISTRICT COURT
103	01/17/1990	& ATTORNEY GENERAL.
104	01/19/1990	FILE TRANSCRIPT OF PROCEEDINGS HELD 12-12-90 & 12-14-90.
105	01/25/1990	JUDGE: NICKOLAS GEEKER

106	01/25/1990	ORDER: ORDER OF INSOLVENCY FILED.
107	01/30/1990	ORDER OF INSOLVENCY MAILED TO DISTRICT COURT.
108	01/30/1990	JUDGE: NICKOLAS GEEKER
109	01/30/1990	ORDER: TO TRANSCRIBE PROCEEDINGS FILED.
110	01/30/1990	JUDGE: NICKOLAS GEEKER
111	01/30/1990	ORDER: OF INSOLVENCY FILED.
112	02/12/1990	FILE TRANSCRIPT OF PROCEEDINGS HELD 11-13-90 & 11-16-90.
113	02/22/1990	TRANSCRIPT OF RECORD ON APPEAL MAILED TO DISTRICT COURT,
114	02/22/1990	ATTORNEY GENERAL & DELIVERED TO THE PUBLIC DEFENDER, PER
115	02/22/1990	INSTRUCTIONS OF MACK PLANT, ATTY.
116	02/28/1990	FILE DESIGNATION OF PUBLIC DEFENDER, SECOND JUDICIAL CIRCUIT,
117	02/28/1990	FOR HANDLING OF APPEAL
118	06/10/1991	FILE MANDATE & OPINION FROM DISTRICT COURT AFFIRMING JUDGMENT

119	06/10/1991	OF THIS COURT.
120	07/11/1991	FILE MOTION FOR MITIGATION & REDUCTION OF SENTENCE
121	07/19/1991	FILE ORDER DENYING MOTION FOR MITIGATION & REDUCTION OF SENTENCE
122	10/07/1992	MOTION FOR POST CONVICTION RELIEF FILED
123	10/07/1992	FILE MEMORANDUM IN SUPPORT OF PETITIONER'S 3.850 MOTION FOR
124	10/07/1992	POST-CONVICTION RELIEF
125	10/09/1992	CASE REOPENED: 100792, REASON CODE: P, COUNT NUMBER: 01.
126	01/04/1993	JUDGE: NICKOLAS P. GEEKER
127	01/04/1993	ORDER: DISMISSING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF.
128	03/02/1993	MOTION FOR POST CONVICTION RELIEF FILED
129	03/02/1993	FILE MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS 3.850 MOTION
130	03/02/1993	FOR POST-CONVICTION RELIEF

131	03/09/1993	CASE REOPENED: 030293, REASON CODE: P, COUNT NUMBER: 01.
132	12/20/1994	JUDGE: KIM SKIEVASKI
133	12/20/1994	ORDER: TO SHOW CAUSE
134	04/17/1995	FILE MOTION TO EXTENDED TIME
135	04/21/1995	JUDGE: SKIEVASKI
136	04/21/1995	ORDER: TO EXTEND STATES TIME TO RESPOND FILED
137	11/30/1995	FILED LETTER FROM DIV B TO L. KADEN, STATE REQUIRING RESPONSE
138	11/30/1995	TO ORDER TO SHOW CAUSE WITHIN 30 DAYS FROM THIS DATE (12-30-95)
139	01/03/1996	FILED RESPONSE TO ORDER TO SHOW CAUSE.
140	01/22/1996	JUDGE: SKIEVASKI
141	01/22/1996	ORDER: DENYING MOTION FOR POST CONVICTION RELIEF FILED.
142	12/26/1996	FILE DEFENDANT'S REQUEST FOR DOCUMENTS
143	01/08/1997	MAILED DEFENDANT COPY OF INFORMATION & JUDGMENT AND SENTENCE

144	07/28/1997	MAILED DEFT. LETTER IN RESPONSE OF REQUEST FOR COPIES OF
145	07/28/1997	TRANSCRIPTS.
146	06/02/2003	FILE PRO SE MOTION FOR DNA EVIDENCE EXAMINATION
147	06/05/2003	FILE PRO SE MOTION FOR TRIAL TRANSCRIPTS AT STATE'S EXPENSE
148	06/26/2003	JUDGE FRANK BELL
149	06/26/2003	FILE ORDER DENYING DEFENDANT'S PRO SE MOTION FOR TRIAL TRANSCRIPTS AT STATE'S EXPENSE
150	06/26/2003	JUDGE FRANK BELL
151	06/26/2003	FILE ORDER DENYING MOTION FOR DNA EVIDENCE EXAMINATION
152	05/15/2006	DEFENDANT'S REQUEST FOR DOCUMENTS FILED
153	07/13/2006	DEFENDANT LETTER FILED
154	07/27/2006	FILED PRO SE AMENDED MOTION TO/FOR DNA EVIDENCE EXAMINATION
155	10/06/2006	NOTICE OF INQUIRY FILED
156	10/06/2006	RESPONSE LETTER MAILED TO DEFENDANT

157	10/19/2006	JUDGE: BELL
158	10/19/2006	ORDER TO SHOW CAUSE ON TIM BALDWIN, ASSISTANT STATE ATTORNEY (DNA EVIDENCE), HEARING TO BE HELD 30 DAYS FROM THE DATE OF THIS ORDER
159	11/13/2006	FILE STATE'S RESPONSE TO ORDER TO SHOW CAUSE
160	11/20/2006	JUDGE: BELL
161	11/20/2006	ORDER GRANTING LIMITED EVIDENTIARY HEARING
162	12/22/2006	JUDGE FRANK BELL
163	12/22/2006	PETITION FOR WRIT & OF HABEAS CORPUS AD TESTIFICANDUM FILED.
164	01/04/07	FILE SUBPOENA RETURNED SERVED
165	01/09/07	JUDGE FRANK BELL
166	01/09/07	ASSISTANT STATE ATTORNEY: B. JENSEN
167	01/09/07	ATTORNEY NOT PRESENT
168	01/09/07	DEFENDANT IN CUSTODY (PRESENT IN COURT)
169	01/09/07	COURT REPORTER: CB
170	01/09/07	COURT CLERK: RK

171	01/09/07	AARYN URELL AND IRENE JO PRESENT FROM EQUAL JUSTICE INITIATIVE OF ALABAMA
172	01/09/07	ATTY SONYA RUDENSTINE NOT PRESENT TO REPRESENT DEFENDANT FOR PURPOSES OF LIMITED EVIDENTIARY HEARING – LIMITED EVIDENTIARY HEARING NOT HELD TODAY TO BE RESCHEDULED IN APPROXIMATELY 2 WEEKS FOR ATTORNEY TO BE PRESENT
173	01/09/07	DEFENDANT TO REMAIN IN ESCAMBIA CO. JAIL PENDING HEARING
174	01/09/07	FILED VERIFIED MOTION FOR ADMISSION TO APPEAR PRO HAC VICE PURUSANT TO FLORIDA RULE OF JUDICIAL AMINSTRATION [sic] 2.510
175	01/09/07	NOTICE OF APPEARANCE OF BRYAN STEVENSON, AARYN URELL, REBECCA KILEY AND SONYA RUDENSTINE AS COUNSEL OF RECORD FILED
176	01/16/07	CREDIT CARD FEE Receipt: 710688 Date: 01/16/2007

177	01/16/07	COPIES/CERTIFICATIONS/ POSTAGE Receipt: 710688 Date: 01/16/2007
178	01/16/07	CORRESPONDENCE FILED FROM JUDGE TO STATE ATTORNEY
179	01/18/07	PER COURT –LIMITED EVIDENTIARY HEARING ON MOTION FOR DNA EXAMINATION RESET TO 1-30-2007, 1:30 PM
180	01/19/07	FILE SUBPOENA RETURNED SERVED
181	01/22/07	NOTICE OF HEARING: MOTION FOR DNA EVIDENE EXAMINATION TO BE HELD 1/30/2007 @ 1:30 PM
182	01/30/07	JUDGE FRANK BELL
183	01/30/07	ASSISTANT STATE ATTORNEY: B. JENSEN
184	01/30/07	DEFENSE ATTORNEY: S. RUDENSTINE, REBECCA KILEY & RANDY SUSSKIND
185	01/30/07	LIMITED EVIDENTIARY HEARING HELD ON MOTION FOR DNA EVIDENCE
186	01/30/07	TAKEN UNDER ADVISEMENT

187	01/30/07	DEFENDANT TO BE TRANSPORTED BACK TO STATE PRISON
188	01/30/07	PAPER/PICTURE STATE EXHIBITS FILED IN COURT FILE
189	01/30/07	EXHIBIT LIST FILED
190	01/30/07	AMENDED NOTICE OF APPEARANCE OF COUNSEL FILED: BRYAN STEVENSON, RANDALL SUSSKIND, REBECCA KILEY & SONYA RUDENSTINE
191	01/31/07	FILED AMENDED NOTICE OF APPEARANCE BY: BRYAN STEVENSON
192	01/31/07	FILE AMENDED VERIFIED MOTION FOR ADMISSION TO APPEAR PRO HAC VICE PURSUANT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.510
193	02/19/07	ORDER DENYING DEFENDANTS PRO SE MOTION FOR POST-CONVICTION DNA FILED.
194	07/24/07	MOTION FOR POST CONVICTION RELIEF FILED
195	07/24/07	MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR

		POSTCONVITION [sic] RELIEF FILED
196	07/24/07	MOTION TO HAVE THE RECORD REFLECT THAT THIS COURT GRANTED MOVANT'S AMENDED MOTION FOR ADMISSION TO APPEAR PRO HAC VICE PURSUANT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.510
197	11/02/07	ORDER DISMISSING WITH PREJUDICE DEFENDANTS MOTION FOR POST-CONVICTION RELIEF FILED.
198	11/02/07	FILED ORDER THAT THE RECORD SHALL RFLECT [sic] THIS COURTS GRANTING OF THE AMENDED MOTION FOR ADMISSION TO APPEAR PRO HAV [sic] VICE PURSUANT TO FLORIDA RULES OF JUDICIAL ADMINISTRATION 2.510
199	11/30/07	NOTICE OF APPEAL FILED BY: BRYAN STEVENSON

First District Court of Appeal Case Docket

Case Number: 1D07-6433

Final Criminal 3.850 Notice from Escambia County

JOE SULLIVAN vs. State of Florida

Lower Tribunal Case(s): 89-2693

Date Docketed	Description	Date Due	Filed By	Notes
12/05/2007	Motion For Leave To Appear as Foreign Counsel		Rebecca Kiley	to appear pro hac vice
12/05/2007	Miscellaneous Motion		Rebecca Kiley	to waive pro hac vice fee payable to Fla. Bar
12/19/2007	Notice of Appeal Filed		Bryan A. Stevenson	
12/19/2007	Received Records			1 vol
12/21/2007	Notice of Appeal/ Acknowledgement letter			
12/27/2007	Motion for Oral Argument		Rebecca Kiley	
12/27/2007	Initial Brief on Merits		Rebecca Kiley	Copy in B Directory – COPIES DESTROYED
12/31/2007	File Amd NOA Orig Signature (PS)/Form Att-103C	01/15/2008		amended noa signed by fla attorney
01/03/2008	Motion To Strike		Joshua R. Heller, A.A.G. 0502901	brf
01/04/2008	Grant Pro Hac Vice Appearance-40			The motion of Rebecca Kiley, filed December 5, 2007, seeking leave to appear in this cause pro hac vice on behalf of appellant, is granted. Appellant's motion to waive pro hac vice fee, filed December 5, 2007, is granted. This order constitutes the notice of waiver of fee as required by Florida Rule of Judicial Administration 2.510(b)(f)

01/04/2008	Grant Miscellaneous Motion-79			The motion of Rebecca Kiley, filed December 5, 2007, seeking leave to appear in this cause pro hac vice on behalf of appellant, is granted. Appellant's motion to waive pro hac vice fee, filed December 5, 2007, is granted. This order constitutes the notice of waiver of fee as required by Florida Rule of Judicial Administration 2.510(b)(f)
01/08/2008	Amended Notice of Appeal		Sonya Rudenstine 0711950	signed by fla atty
01/08/2008	Docketing Statement			AA Rebecca Kiley
01/08/2008	RESPONSE		Rebecca Kiley	notedkp
01/14/2008	RESPONSE		Rebecca Kiley	A1 to mo strike
01/14/2008	Miscellaneous Motion		Rebecca Kiley	A2 mo accept amended brf – 2nd amnd brf stricken
01/14/2008	Amended Initial Brief		Rebecca Kiley	
01/17/2008	Grant Motion to Strike-13	02/16/2008		Appellee's motion to strike filed January 3, 2008, is granted and the amended initial brief filed on January 14, 2008, is hereby stricken. Appellant shall have 30 days from the date of this order to file a second amended initial brief which complies with Florida Rule of Appellate Procedure 9.210. Specifically, the amended initial brief shall contain a citation to the official record on appeal in this case for every fact asserted in the statement of the case and facts. Appellant is warned that the failure to comply with the terms of this order within the time allowed

				may result in the imposition of sanctions, including dismissal of the appeal, without further opportunity to be heard. Florida Rule of Appellate Procedure 9.410.
02/18/2008	Amended Initial Brief		Rebecca Kiley	2nd amended *Copy in B Directory
02/20/2008	Notice of Filing No Answer Brief		Joshua R. Heller, A.A.G. 0502901	
02/21/2008	RESPONSE		Joshua R. Heller, A.A.G. 0502901	NOTED in oppo to OA
06/17/2008	Affirmed-Per Curiam Affirmed			
06/17/2008	OA Denied-81			
07/02/2008	Motion for Rehearing/ Rehearing En Banc		Rebecca Kiley	certification
08/06/2008	Deny Appellant's Motion for Rehearing-56A			or rehearing en banc and certification
08/22/2008	Case Closed			
08/22/2008	Circuit Court Mandate			
08/22/2008	West Publishing			
08/22/2008	Court/Agency Mandate Cover Letter			
08/25/2008	Notice of Change of Address		Sonya Rudenstine 0711950	
09/22/2008	Returned Records			1 vol via dhl
09/22/2008	Case Permanent			
12/15/2008	Miscellaneous Docket Entry			cert to USSC
05/11/2009	Miscellaneous Docket Entry			fee ord granted and pet granted

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,	*	
Plaintiff,	*	
	*	Criminal Division
vs.	*	
JOE HARRIS SULLIVAN,	*	Case No. 89-2693
	*	
Defendant.	*	

MOTION FOR POSTCONVICTION RELIEF

(Filed Jul. 24, 2007)

Joe Harris Sullivan moves this Court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure for relief from his unconstitutionally obtained conviction and sentence, and as grounds in support of this motion alleges:

1. *Name and location of the court that entered the judgment of conviction and sentence under attack*: Circuit Court, First Judicial Circuit, Escambia County, Florida.

2. *Date of judgment of conviction*: December 12, 1989.

3. *Length of Sentence*: Two sentences of life without the possibility of parole and two sentences of fifteen years, all concurrent.

4. *Nature of offense(s) involved*: Two counts of burglary of a dwelling and two counts of sexual battery.

5. *Plea*: Not guilty.

6. *Kind of trial*: Jury.

7. *Did movant testify at the trail or any pretrial hearing?* Yes, Joe testified at trial on November 16, 1989. There were no pre-trial hearings.

8. *Did movant appeal from the judgment of conviction?* Yes.

9. *If movant did appeal answer the following*:

   (a) *Name of court*: First District Court of Appeal of Florida.

   (b) *Result*: Affirmed.

   (c) *Date of result*: May 22, 1991.

   (d) *Citation*: *State v. Sullivan*, No. 91-190, 580 So. 2d 755 (Table) (Fla. 1st Dist. Ct. App. May 22 1991).

   (e) *Name of court*: Florida Supreme Court.

   (f) *Result*: Review dismissed.

   (g) *Date of result*: June 12, 1991.

   (h) *Citation*: *State v. Sullivan*, No. SC60-78050, 583 So. 2d 1037 (Table) (Fla. June 12, 1991).

10. *Other than a direct appeal from the judgment of conviction and sentence, has movant previously filed any petitions, applications, motions, etc. with respect to this judgment in this court?* Yes.

11. *If the answer to number 10 was "yes," give the following information*:

(a)(1) *Nature of the Proceeding*: Motion for Mitigation and Reduction of Sentence.

(a)(2) *Grounds Raised*: Mitigating circumstances the Court may not have considered including that Joe was only 13 years old at the time of the offense.

(a)(3) *Did movant receive an evidentiary hearing on this motion?* No.

(a)(4) *Result*: Denied.

(a)(5) *Date of Result*: July 18, 1991.

(b)(1) *Nature of the Proceeding*: Motion for Post-conviction Relief.

(b)(2) *Grounds raised*: Trial counsel was ineffective for failing to obtain a semen sample from Joe to compare with that taken from the victim in violation of Joe's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and trial counsel was ineffective for failing to object to the admission of evidence of his co-defendants convictions in violation of Joe's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

(b)(3) *Did movant receive an evidentiary hearing on this motion?* No.

(b)(4) *Result*: Denied.[1]

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[1] The motion was initially dismissed as facially insufficient on January 4, 1993 but an amended motion was filed on March 2, 1993.

(b)(5) *Date of Result*: January 22, 1996.

(c)(1) *Nature of the Proceeding*: Motion for DNA Evidence Examination.

(c)(2) *Grounds Raised*: Requested testing of sperm sample and pubic hairs.

(c)(3) *Did movant receive an evidentiary hearing on this motion?* Yes.

(c)(4) *Result*: Denied because the evidence had been destroyed.[2]

(c)(5) *Date of Result*: February 15, 2007.

12. *Other than a direct appeal from the judgment of conviction and sentence, has movant filed any petitions, applications, motions, etc. with respect to this judgment in any other court?* Yes.

13. *If movant's answer to number 12 was "yes," give the following information*:

(a)(1) *Name of Court*: First District Court of Appeal of Florida.

(a)(2) *Nature of the Proceeding*: Original Petition for Writ of Habeas Corpus.

(a)(3) *Grounds Raised*: Unknown; counsel has been unable to obtain a copy because the petition has been destroyed by the court.

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[2] The motion was initially dismissed as legally insufficient on June 24, 2003 with leave to amend within 30 days and an amended motion was filed on July 6, 2003.

(a)(4) *Did movant receive an evidentiary hearing on this petition?* No.

(a)(5) *Result*: Denied.

(a)(6) *Date of Result*: April 15, 1997.

14. The grounds for postconviction relief is as follows:

A. Ground 1: *Roper v. Simmons* Requires Sentencing Relief for a Thirteen-Year-Old Sentenced to Die in Prison.

Joe Sullivan was sentenced to life imprisonment without the possibility of parole for a non-homicide crime that occurred when he was only thirteen years old. This sentence violates the United States Supreme Court's recent decision in *Roper v. Simmons*, 543 U.S. 551 (2005), which held that because the "culpability or blameworthiness" of a juvenile "is diminished, to a substantial degree, by reason of youth and immaturity," certain punishments for juveniles are prohibited by the Eighth and Fourteenth Amendments. *Id.* at 571 (holding that the death penalty is an unconstitutional sentence for defendants who were under eighteen years of age at the time of the offense). Children aged thirteen and younger are a distinct group of juveniles for whom a sentence to die in prison is unusual, excessive, and unconstitutional. Joe's illegal and unconstitutional sentence violates article I, section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution and requires this Court to grant postconviction relief. The

legal bases for this claim are further laid out in the attached memorandum, but the following facts are relevant to the claim:

At the time of the crime, Joe was a thirteen-year-old child living in a home where he was regularly subjected to physical and sexual abuse. Joe is also mentally disabled. On the day of the incident, two older boys persuaded him to commit a burglary with them. (R. 193.) The three boys entered the home of Lena Bruner while she was not home and one of the other boys took some money and jewelry. (R. 136-39, 162.) The three boys then left. (R. 139, 162.) After Ms. Bruner returned later that day, she was raped by an assailant that she never saw. (R. 75-76, 81-83.) One of the older boys, who may well have been the true assailant, accused Joe of the rape and each of the older boys received only short sentences in juvenile detention. (R. 134, 141, 158, 171-73.) No biological evidence was presented in the case against Joe, and the biological evidence which would have exonerated him through DNA testing was destroyed by the State in 1993. Joe's trial lasted less than a day, from jury selection through the verdict, and was riddled with inflammatory and unreliable evidence, from the extremely suspect testimony of his co-defendants, to the highly suggestive in-court voice identification by the victim, to the prosecutor's repeated and irrelevant references to the fact that Joe was African-American and the victim in the case was white. Following his conviction, he was sentenced to life imprisonment without the possibility of parole.

Joe is one of only three thirteen-year-olds to be sentenced to die in prison for a non-homicide nationwide. Extensive research by undersigned counsel has uncovered children thirteen years old or younger sentenced to life without parole in only five other states.[3] Thus, in the vast majority of states, no child Joe's age has been subjected to life imprisonment without possibility of parole.

Undersigned counsel has been able to identify only nine cases nationwide in which a sentence of life without parole has been imposed on someone aged thirteen or younger. Of the six states that have imposed a life without parole sentence on a thirteen-year-old, four have only one such case and the others, including Florida, have only two. Only one half of one percent of all juveniles sentenced to die in prison were thirteen years old at the time of the offense. *See* Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 26 (2005), http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

Nationwide, only three thirteen-year-olds, including Joe, have received life without parole sentences for crimes in which the victim did not die. Only one state other than Florida, North Carolina, has sentenced a thirteen-year-old to die in prison for a non-homicide. Looking at the specific offense of

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[3] Illinois, Nebraska, North Carolina, Pennsylvania, and Washington.

which Joe was convicted, sexual battery, only two thirteen-year-olds have been sentenced to die in prison for comparable offenses, and only Florida and North Carolina have imposed such sentences. Joe is the only thirteen-year-old in Florida to be sentenced to life without parole for sexual battery.

Cases in which children aged thirteen have been sentenced to life without parole represent just a tiny fraction of cases in which children that age have been arrested for rape. For example, in just the ten-year period between 1996 and 2005, 12,340 children fourteen years old or younger[4] were arrested for rape nationwide. U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States (2005), *available at* http://www.fbi.gov/ucr/ucr.htm; *id.* at 290 (2004); *id.* at 280 (2003); *id.* at 244 (2002); *id.* at 244 (2001); *id.* at 226 (2000); *id.* at 222 (1999); *id.* at 220 (1998); *id.* at 232 (1997); *id.* at 224 (1996). However, none of these children were sentenced to life without parole. Both of the sexual offenses for which thirteen-year-old children have received life without parole

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[4] Statistics are not available that distinguish thirteen-year-olds from fourteen-year-olds for this purpose. However, even including fourteen-year-olds, death-in-prison sentences for non-homicides are extremely rare. Undersigned counsel has been able to identify only four fourteen-year-olds, three in Florida and one in California, who have been sentenced to die in prison for a non-homicide. Only two of these fourteen-year-olds received that sentence for a sexual battery, and both predate the ten-year period between 1996 and 2005. No fourteen-year-old child has been sentenced to die in prison for a sexual offense in the last fifteen years.

predated this ten-year period. No child aged thirteen anywhere in the country has been sentenced to die in prison for a sexual offense committed in the last thirteen years, and, in Florida, no child that age has been sentenced to life without parole for a sexual offense in fifteen years.

A growing number of psychosocial studies of adolescents support the idea that young adolescents, in particular, have deficient decision-making capabilities. An extensive study of adolescent decision-making capabilities, which focused specifically on legal-competence related issues, concluded that "juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants." Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333, 356 (August 2003). These impairments are even more pronounced among juveniles aged thirteen and younger. As many as one in three eleven- to thirteen-year-olds "are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial." *Id.* Other research confirms that young teenagers are immature in their decision-making capabilities, particularly in the areas of responsibility, perspective, and impulse-control. *See* Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be*

Less Culpable than Adults, 18 Behav. Sci. & Law 18, 741, 756 (2000) ("the steepest inflection point in the [psychosocial maturity] developmental curve occurs sometime between 16 and 19 years . . . the period between 16 and 19 marks an important transition point in psychosocial development."); *see also* Bonnie L. Halpern-Felsher and Elizabeth Cauffman, *Costs and benefits of a decision: Decision-making competence in adolescents and adults*, 22 J. Applied Developmental Psychol. 257 (2001) (noting important differences exist in the decision-making competence of early adolescents and older teenagers.)

This psychosocial research is supported by recent advances in neuroscience in understanding "the explosive changes" of the brain's structure that occur during the teenage years. *See* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, Annals N.Y. Acad. Sci. 1021:77-85, 83 (2004) (hereinafter "Giedd 2004"). As the American Psychological Association explained in its *amicus* brief to the United States Supreme Court in *Roper*, advances in magnetic resonance imaging (MRI) technology, beginning in the 1990s, "have opened a new window into the differences between adolescent and adult brains." Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent, at 9, *Roper v. Simmons*, 543 U.S. 551 (2005) (No.

03-633); *see also* Giedd 2004 (MRI technology has launched a new era of adolescent neuroscience).[5]

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[5] Of particular importance, MRI studies are shedding light on the development of the frontal lobes of the brain. The frontal lobes and in particular the prefrontal cortex are critical to executive functioning of the brain, and frontal lobe impairment is associated with greater impulsivity and difficulty in self-monitoring and decision-making. *See, e.g.*, J.M. Fuster, *The Prefrontal Cortex: Anatomy, Physiology, and Neuropsychology of the Frontal Lobe*, (2nd ed. Raven 1989); Donald T. Stuss & Catherine A. Gow, *"Frontal Dysfunction" After Traumatic Brain Injury*, Neuropsychiatry, Neuropsychology, & Behav. Neurology 272, 278 (1992). New neurodevelopmental MRI research shows that the composition of the frontal lobes, which consist of white and gray brain matter, change during adolescence. Notably, the proliferation of gray matter peaks in early adolescence. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861, 861-862 (1999). The frontal lobes of the brain are among the last parts of the brain to reach maturity. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1013 (Dec. 2003) ("patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into adolescence.") As young teenagers grow into adulthood, that gray matter of the frontal lobes thins, and white matter significantly increases, allowing the brain to process information more efficiently and reliably. Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 144 (Oxford Univ. Press 2001).

These facts support Joe's petition and demonstrate that after the United States Supreme Court's decision in *Roper* it is unconstitutional to sentence a thirteen-year-old child to die in prison. The legal bases for this claim are discussed further in the attached memorandum.

15. *If the ground listed in 14 A was not previously presented on movant's direct appeal, state briefly and give reasons they were not so presented:* Joe's claim under *Roper* was not previously presented in his direct appeal because the opinion in that case was not issued until after the conclusion of Joe's direct appeal.

16. *Does movant have any petition, application, appeal, motion, etc. now pending in any court, either state or federal, as to the judgment under attack?* No.

17. *If movant's answer to number 16 was yes, give the following information:* Details about pending petition, applications, appeals, motions, etc. are inapplicable because Joe does not have any of these pending in any court, either state or federal, relating to the judgment under attack.

18. *Give the name and address, if known, of each attorney who represented movant in the following stages of the judgment attacked herein.*

    (a) *At preliminary hearing*: There were no preliminary hearings.

    (b) *At arraignment and plea*: Elton Killam, Office of the Public Defender, PO Box 12666, Pensacola, FL 32474.

(c) *At trial*: Mack A. Plant, 310 East Government Street, Pensacola, FL 32501.

(d) *At sentencing*: Mack A. Plant, 310 East Government Street, Pensacola, FL 32501.

(e) *On appeal*: Carl McGinnes, Office of the Public Defender, 301 S. Monroe Street, Tallahassee, FL 32301.

(f) *In any postconviction proceeding*: All postconviction proceedings prior to January 9, 2007 were conducted *pro se*. After January 9, 2007, Joe was represented in his Motion for DNA Evidence Examination by Bryan Stevenson, Randall Susskind, and Rebecca Kiley of the Equal Justice Initiative of Alabama, 122 Commerce Street, Montgomery, AL 36104, assisted by local counsel Sonya Rudenstine, 1221 NE 3rd Street, Gainesville, FL 32601.

WHEREFORE, Joe, by and through undersigned counsel, requests that this Court grant all relief to which movant may be entitled in this proceeding, including but not limited to:

1. Vacate his sentence of life without parole and impose a term of years;

2. Such other and further relief as the Court deems just and proper.

Respectfully submitted this 24th day of July, 2007,

/s/ Bryan Stevenson
BRYAN A. STEVENSON
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OATH

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.

/s/ Joe Sullivan
Joe Sullivan
Date: 7/24/07

[Certificate Of Service And Certificate Of Compliance Omitted In Printing]

IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,	*	
	*	
Plaintiff,	*	Criminal Division
	*	
vs.	*	Case No. 89-2693
	*	
JOE HARRIS SULLIVAN,	*	
	*	
Defendant.	*	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR POSTCONVICTION RELIEF

(Filed Jul. 24, 2007)

In support of his attached motion for postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure, Joe Harris Sullivan submits the following memorandum of law.

INTRODUCTION

Joe Sullivan was sentenced to life imprisonment without the possibility of parole for a non-homicide offense that occurred when he was only thirteen years old. This sentence violates the United States Supreme Court's recent decision in *Roper v. Simmons*, 543 U.S. 551 (2005), which held that because the "culpability or blameworthiness" of a juvenile "is diminished, to a substantial degree, by reason of youth and immaturity," certain punishments for juveniles are prohibited by the Eighth and Fourteenth Amendments.

Id. at 571 (holding that the death penalty is an unconstitutional sentence for defendants who were under eighteen years of age at the time of the offense). Children aged thirteen and younger are a distinct group of juveniles for whom a sentence to die in prison is unusual, excessive, and unconstitutional. Joe's illegal and unconstitutional sentence violates article I, section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution and requires this Court to grant postconviction relief.

At the time of the crime, Joe was a thirteen-year-old child living in a home where he was regularly subjected to physical and sexual abuse. Joe is also mentally disabled. On the day of the incident, two older boys persuaded him to commit a burglary with them. (R. 193.) The three boys entered the home of Lena Bruner while she was not home and one of the other boys took some money and jewelry. (R. 136-39, 162.) The three boys then left. (R. 139, 162.) After Ms. Bruner returned later that day, she was raped by an assailant that she never saw. (R. 75-76, 81-83.) One of the older boys, who may well have been the true assailant, accused Joe of the rape and each of the older boys received only short sentences in juvenile detention. (R. 134, 141, 158, 171-73.) No biological evidence was presented in the case against Joe, and the biological evidence which would have exonerated him through DNA testing was destroyed by the State in 1993. Joe's trial lasted less than a day, from jury selection through the verdict, and was riddled with

inflammatory and unreliable evidence, from the extremely suspect testimony of his co-defendants, to the highly suggestive in-court voice identification by the victim, to the prosecutor's repeated and irrelevant references to the fact that Joe was African-American and the victim in the case was white. Following his conviction, he was sentenced to life imprisonment without the possibility of parole.

I. *ROPER V. SIMMONS* DICTATES SENTENCING RELIEF FOR THIRTEEN-YEAR-OLDS SENTENCED TO DIE IN PRISON.

Joe is one of only nine thirteen-year-old children to be sentenced to life in prison without the possibility of parole nationwide and one of only three to receive that sentence for a non-homicide. Children who are thirteen years old and younger are a distinct group of juvenile offenders for whom a sentence of life without parole is unconstitutional. Joe's current sentence is unusual, excessive, and in violation of the requirements of the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia,* 408 U.S. 238, 239 (1972) (per curiam); *Robinson v. California*, 370 U.S. 660,

666-67 (1962); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463 (1947) (plurality opinion). Article I, section 17 of the Florida Constitution similarly states: "Excessive fines, [as well as] cruel and unusual punishment . . . are forbidden. . . ."

The Florida Supreme Court recognized the retroactivity of *Roper* for the first time on July 25, 2005, when it ordered the sentence of James Bonifay to be reduced from death to life imprisonment with the possibility of parole in twenty-five years. *Bonifay v. State,* No. SC04-675 (Fla. July 25, 2005). Mr. Bonifay's conviction was final at the time the Florida Supreme Court vacated his sentence pursuant to *Roper. See Bonifay v. State*, 680 So. 2d 413 (Fla. 1996) (affirming Bonifay's conviction and sentence on direct appeal). Because Florida law provides that defendants have two years from the date of an opinion announcing the retroactivity of a fundamental change in the law to seek post-conviction relief, this Rule 3.850 motion and memorandum are timely filed. *Dixon v. State,* 730 So. 2d 265, 267 (Fla. 1999).

A. *Roper v. Simmons* Fundamentally Alters Juvenile Sentencing Under the Eighth Amendment and Condemning a Thirteen-Year-Old to Die in Prison Is Now Constitutionally Prohibited.

In *Roper v. Simmons,* 543 U.S. 551 (2005), the United States Supreme Court changed the requirements of the Eighth Amendment with respect to

sentencing of juveniles. Recognizing that three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," the Court prohibited death sentences for older teenagers. *Id.* at 569. The same analysis now compels the conclusion that a life-without-parole sentence for younger adolescents is similarly prohibited.

First, the Court found that juveniles tend to suffer from a lack of maturity and an "underdeveloped sense of responsibility," which often result in "impetuous and ill-considered actions and decisions." *Id.* at 569 (citing *Johnson v. Texas,* 509 U.S. 350, 367 (1993)). Thus, "adolescents are overrepresented . . . in virtually every category of reckless behavior." *Id.* A thirteen-year-old's lack of responsibility and immaturity is consonant with recent research indicating that the human brain continues to develop into an individual's early twenties.[1]

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[1] Scientists are only just beginning to understand "the explosive changes" of the brain's structure that occur during the teenage years. *See* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain,* Annals N.Y. Acad. Sci. 1021:77-85, 83 (2004) (hereinafter "Giedd 2004"). New MRI research shows that the composition of the frontal lobes of the brain, which are critical to executive functioning, change during adolescence. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study,* 2 Nature Neuroscience 861, 861-862 (1999). The frontal lobes, which are active during long-term planning, judgment, and decision making, are among the last parts of the brain to reach maturity. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical*

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Second, young children "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* at 569. They "have less control . . . over their own environment [and therefore] . . . lack the freedom that adults have to extricate themselves from a criminogenic setting." *Id.* (internal quotation and citation omitted). As the Supreme Court recognized in *Eddings v. Oklahoma,* 455 U.S. 104 (1982), "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* at 115.

Finally, the character of a child is not as well formed as that of an adult. "The personality traits of juveniles are more transitory, less fixed." *Roper,* 543 U.S. at 570. As a consequence of these limitations, the Court concluded that, it would be "misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Recognizing that juveniles engage in reckless behavior, Florida has made the age of majority eighteen, Fla. Stat. § 743.07 (2006); the minimum age to vote eighteen, Fla. Stat. § 97.041(1)(a) (2006); and the minimum age for jury service eighteen, Fla. Stat.

Development During Childhood Through Early Adulthood, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty,* 58 Am. Psychologist 1009, 1013 (Dec. 2003).

§ 40.01 (2006). The federal government prohibits the purchase of alcohol by any individual under the age of twenty-one, 23 U.S.C. § 158, and has made the minimum age for military service seventeen, 10 U.S.C. § 505.

B. Children Thirteen and Younger Are Distinct From Older Teens Developmentally and for Purposes of Punishment.

The analysis of the Supreme Court in *Roper* has the greatest force and application to the youngest offenders, which makes the new constitutional framework for sentencing juveniles most compelling in this case. Joe was sentenced to life without parole for an offense that he committed when he was thirteen years old, and received the harshest sentence possible under Florida law with no meaningful consideration of his age or the constitutionally significant considerations relevant to juvenile sentencing after *Roper*.

Like every other state, Florida has recognized a thirteen-year-old child's decision-making capacity is less developed than that of older juveniles by placing additional legal restrictions on younger adolescents. Florida requires by law that thirteen-year-olds attend school. Fla. Stat. § 1003.21(1)(a) (2006). Thirteen-year-olds cannot drive. Fla. Stat. § 322.05(1) (2006). Florida law narrowly circumscribes the conditions under which thirteen-year-olds may marry, Fla. Stat. § 741.0405(4) (2006), and thirteen-year-olds cannot consent to sexual activity, Fla. Stat. § 800.04 (2006).

The federal government strictly regulates the hours and conditions under which thirteen-year-olds may be employed. *See* 29 U.S.C. §§ 203, 212, 213.

A growing number of psychosocial studies of adolescents support the idea that young adolescents, in particular, have deficient decision-making capabilities. An extensive study of adolescent decision-making capabilities, which focused specifically on legal-competence related issues, concluded that "juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants." Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults Capacities as Trial Defendants,* 27 L. & Hum. Behav. 333, 356 (August 2003). These impairments are even more pronounced among juveniles aged thirteen and younger. As many as one in three eleven- to thirteen-year-olds "are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial." *Id.* Other research confirms that young teenagers are immature in their decision-making capabilities, particularly in the areas of responsibility, perspective, and impulse-control. *See* Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults,* 18 Behav. Sci. & Law 18, 741, 756 (2000) ("the steepest inflection point in the [psychosocial maturity] developmental curve occurs sometime between

16 and 19 years . . . the period between 16 and 19 marks an important transition point in psychosocial development"); *see also* Bonnie L. Halpern-Felsher and Elizabeth Cauffman, *Costs and benefits of a decision: Decision-making competence in adolescents and adults,* 22 J. Applied Developmental Psychol. 257 (2001) (noting important differences exist in the decision-making competence of early adolescents and older teenagers.) These are the types of impairments identified by the Supreme Court as relevant to a consideration of adolescent culpability. *Roper,* 543 U.S. at 569 ("[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.") (citations omitted).

This psychosocial research is supported by recent advances in neuroscience in understanding "the explosive changes" of the brain's structure that occur during the teenage years. *See* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain,* Annals N.Y. Acad. Sci. 1021:77-85, 83 (2004) (hereinafter "Giedd 2004"). As the American Psychological Association explained in its *amicus* brief to the United States Supreme Court in *Roper,* advances in magnetic resonance imaging (MRI) technology, beginning in the 1990s, "have opened a new window into the differences between adolescent and adult brains." Brief for the American Psychological Association, and the Missouri Psychological Association as Amici

Curiae Supporting Respondent, at 9, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); *see also* Giedd 2004 (MRI technology has launched a new era of adolescent neuroscience).[2]

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[2] Of particular importance, MRI studies are shedding light on the development of the frontal lobes of the brain. The frontal lobes and in particular the prefrontal cortex are critical to executive functioning of the brain, and frontal lobe impairment is associated with greater impulsivity and difficulty in self-monitoring and decision-making. *See, e.g.*, J.M. Fuster, *The Prefrontal Cortex: Anatomy, Physiology, and Neuropsychology of the Frontal Lobe*, (2nd ed. Raven 1989); Donald T. Stuss & Catherine A. Gow, *"Frontal Dysfunction" After Traumatic Brain Injury*, Neuropsychiatry, Neuropsychology, & Behav. Neurology 272, 278 (1992). New neurodevelopmental MRI research shows that the composition of the frontal lobes, which consist of white and gray brain matter, change during adolescence. Notably, the proliferation of gray matter peaks in early adolescence. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861, 861-862 (1999). The frontal lobes of the brain are among the last parts of the brain to reach maturity. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1013 (Dec. 2003) ("patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into adolescence.") As young teenagers grow into adulthood, that gray matter of the frontal lobes thins, and white matter significantly increases, allowing the brain to process information more efficiently and reliably. Elkhonon Goldberg, *The Executive Brain:*

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Courts have previously found the differences between younger adolescents and older teens to be of critical significance in sentencing. In *Stanford v. Kentucky,* 492 U.S. 361 (1989), the Supreme Court distinguished younger adolescents from those sixteen and older, permitting sixteen- and seventeen-year-olds to be subjected to harsher punishments, including death. *Id.* at 380. Although the holding of *Stanford* was overruled by *Roper,* there is no indication that the Supreme Court intended to abandon the constitutionally significant sentencing distinction between young adolescents and older teenagers.

The recognition that young adolescents have more limited culpability than older teens has resulted in very few sentences of life without parole for children Joe's age. Only one half of one percent of all juveniles sentenced to die in prison were thirteen years old at the time of the offense: *See* Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,* at 26 (2005), http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

The significant distinctions between those thirteen and younger and older juveniles require a distinct constitutionally inquiry into the propriety of sentencing a thirteen-year-old to die in prison.

Frontal Lobes and the Civilized Mind 144 (Oxford Univ. Press 2001).

C. Sentencing a Thirteen-Year-Old to Die in Prison is Extremely Unusual.

Joe is one of only three thirteen-year-olds to be sentenced to die in prison for a non-homicide nationwide. The practice of sentencing thirteen-year-olds to life imprisonment without parole is so infrequent as to render it an arbitrary and "unusual" punishment prohibited by the Eighth Amendment. Extensive research by undersigned counsel has uncovered children thirteen years old or younger sentenced to life without parole in only five other states.[3] Thus, in the vast majority of states, no child Joe's age has been subjected to life imprisonment without possibility of parole.

The nationwide and statewide statistics show that young children are almost never sentenced to die in prison because such a sentence offends evolving standards of decency. Undersigned counsel has been able to identify only nine cases nationwide in which a sentence of life without parole has been imposed on someone aged thirteen or younger. As these numbers indicate, very few states have imposed such a sentence and even in states that have they are extremely rare. Of the six states that have imposed a life without parole sentence on a thirteen-year-old, four have only one such case and the others, including Florida, have only two.

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[3] Illinois, Nebraska, North Carolina, Pennsylvania, and Washington.

Nationwide, only three thirteen-year-olds, including Joe, have received life without parole sentences for crimes in which the victim did not die. Only one state other than Florida, North Carolina, has sentenced a thirteen-year-old to die in prison for a non-homicide. Looking at the specific offense of which Joe was convicted, sexual battery, only two thirteen-year-olds have been sentenced to die in prison for comparable offenses, and only Florida and North Carolina have imposed such sentences. Joe is the only thirteen-year-old in Florida to be sentenced to life without parole for sexual battery.

Cases in which children aged thirteen have been sentenced to life without parole represent just a tiny fraction of cases in which children that age have been arrested for rape. For example, in just the ten-year period between 1996 and 2005, 12,340 children fourteen years old or younger[4] were arrested for rape nationwide. U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States (2005), *available at* http://www.fbi.gov/ucr/ucr.htm; *id.* at 290 (2004);

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[4] Statistics are not available that distinguish thirteen-year-olds from fourteen-year-olds for this purpose. However, even including fourteen-year-olds, death-in-prison sentences for non-homicides are extremely rare. Undersigned counsel has been able to identify only four fourteen-year-olds, three in Florida and one in California, who have been sentenced to die in prison for a non-homicide. Only two of these fourteen-year-olds received that sentence for a sexual battery, and both predate the ten-year period between 1996 and 2005. No fourteen-year-old child has been sentenced to die in prison for a sexual offense in the last fifteen years.

id. at 280 (2003); *id.* at 244 (2002); *id.* at 244 (2001); *id.* at 226 (2000); *id.* at 222 (1999); *id.* at 220 (1998); *id.* at 232 (1997); *id.* at 224 (1996). However, none of these children were sentenced to life without parole. Both of the sexual offenses for which thirteen-year-old children have received life without parole predated this ten-year period. No child aged thirteen anywhere in the country has been sentenced to die in prison for a sexual offense committed in the last thirteen years, and, in Florida, no child that age has been sentenced to life without parole for a sexual offense in fifteen years.

The fact that in the vast majority of states, no children thirteen or younger have been sentenced to life without parole, together with the small number of children serving such sentences even in states that have imposed it, especially for non-homicides, demonstrates that such a sentence is so unusual as to be prohibited by the Eighth Amendment.

In interpreting the Eighth Amendment's prohibition against cruel and unusual punishments, courts must refer to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Roper*, 543 U.S. at 560-61 (citing *Trop*, 356 U.S. at 100-01 (plurality opinion)). "Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence

or the magnitude of its acceptance." *Thompson v. Oklahoma,* 487 U.S. 815, 822 n.7 (1988).

It is well-established that courts should look to the frequency with which a punishment is imposed in determining whether it is unusual for Eighth Amendment purposes. In *Furman,* 408 U.S. 238, the Court struck down Georgia's statute "under which the death penalty was 'infrequently imposed' upon 'a capriciously selected random handful.'" *Godfrey v. Georgia,* 446 U.S. 420, 438 (1980) (Marshall, J., concurring) (citing *Furman,* 408 U.S. at 309-10 (Stewart, J., concurring)); *see also id.* at 439 n.9 (noting that, in *Furman,* Justices Stewart and White "concurred in the judgment largely on the ground that the death penalty had been so infrequently imposed that it made no contribution to the goals of punishment.").[5]

In *Coker v. Georgia,* 433 U.S. 584, 596-97 (1977), the Court looked to the rarity of death sentences for rape of an adult woman in concluding that the death

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[5] *See also Furman,* 408 U.S. at 249 (rarity of a sentence leads to inference of its arbitrary imposition) (Douglas, J., concurring); *id.* at 274-77 (Eighth Amendment prevents arbitrary death sentences; rarity of death sentences results in inference of arbitrariness) (Brennan, J., concurring); *id.* at 299-300 (Brennan, J., concurring); *id.* at 312 (rarity of imposition indicates arbitrariness; "A penalty with such negligible returns to the State would be patently excessive" and therefore violate Eighth Amendment) (White, J., concurring); *id.* at 314 (White, J., concurring); *see also Enmund v. Florida,* 458 U.S. 782, 794-96 (1982) (few juries sentence defendants to death who neither killed nor intended to kill).

penalty is an unconstitutionally cruel and unusual punishment for that crime. Likewise, in *Thompson,* 487 U.S. 815, a plurality of the Court determined that contemporary standards of decency did not permit the execution of offenders under the age of sixteen at the time of the crime, noting that the death penalty was imposed on offenders under sixteen with exceeding rarity. *Id.* at 832-33. When *Atkins v. Virginia,* 536 U.S. 304 (2002), was decided, only a minority of states permitted the execution of persons with mental retardation, "and even in those States it was rare." *Id.* at 314-315. On the basis of these indicia the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" *Roper,* 543 U.S. at 563 (citations omitted); *see also id.* at 564 ("*Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*[*v. Lynaugh*, 492 U.S. 302 (1989),] only five States had executed offenders known to have an IQ under 70.").

The Court in *Roper v. Simmons* found "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal'" so as to render the juvenile death penalty unconstitutionally cruel and unusual based in part on the infrequency of its use even in states where it remained on the books. *Id.* at 568; *see also id.* at 564 (noting that even in twenty states without formal prohibition on executing juveniles, "the practice is infrequent.").

In determining that death is a disproportionate sentence for juvenile offenders, the *Roper* Court also reaffirmed its practice of referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" 543 U.S. at 575. The Court specifically referred to the Convention on the Rights of the Child's prohibition against imposing the death penalty on juveniles and noted that "[p]arallel prohibitions are contained in other significant international covenants." *Id.* at 576.

The United States is one of only a few countries that permit thirteen-year-olds to be sentenced to life in prison without the possibility of parole. *See* Frank C. Newman Int'l Human Rights Clinic & Ctr. for Law & Global Justice, *Special Report on Human Rights Violations in Sentencing Children to Die in Prison,* 5 (June 2007). The Committee on Human Rights for the International Covenant on Civil and Political Rights has found that sentencing children to life without parole conflicts with the obligations of the United States under that treaty. *See* Concluding Observations of the Human Rights Committee on the United States of America, 87th Sess., CCCPR/C/SR.2395, ¶ 34 (July 27, 2006). Outside the United States, only a handful of juveniles of any age are known to have been sentenced to life without parole. *Id.* at 11-13. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, forbids this practice, United Nations

Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 1448, 1468-70 (entered into force Sept. 2, 1990), and, in December 2006, the United Nations General Assembly passed a resolution by a vote of 176 to 1 calling on all states to abolish the sentence, G.A. Res. 61/146, ¶ 31(a), UN Doc. No. A/Res/146 (Dec. 19, 2006).

The rarity with which life imprisonment without parole is imposed on thirteen-year-old children reflects community norms and values that have evolved and reject life without parole sentencing for young children Joe's age. Accordingly, Joe's sentence violates the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida constitution.

Conclusion

Joe's sentence to die in prison is indisputably unusual and is grossly disproportionate to the crime and his level of culpability. As a consequence of his age and concomitant limitations in reasoning and judgment, as the United States Supreme Court recently articulated in *Roper,* Joe's convictions and sentences of life imprisonment without the opportunity for parole are unconstitutional. Accordingly, this Court should vacate Joe's sentence and resentence him to a term of years.

Respectfully submitted,

/s/ Bryan Stevenson
BRYAN A. STEVENSON
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OATH

Under penalties of perjury, I declare that I have read the foregoing memorandum and that the facts stated in it are true.

/s/ Joe Sullivan
Joe Sullivan
Date: 7/24/07

[Certificate Of Service And Certificate Of Compliance Omitted In Printing]

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff/Respondent,

vs.

JOE HARRIS SULLIVAN,
Defendant/Petitioner.

Case No.: 1989 CF 002693 A
Division: B

ORDER DISMISSING WITH PREJUDICE DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

(Filed Nov. 2, 2007)

THIS CAUSE is before the Court on Defendant's Motion for Postconviction Relief, filed July 24, 2007. After due consideration of the instant motion, record, and relevant legal authority, the Court finds that Defendant is not entitled to relief.

On November 16, 1989, a jury found Defendant guilty of two counts of Sexual Battery, two counts of Burglary of Dwelling, and one count of Petit Theft.[1] The Court sentenced Defendant to 15 years, each count concurrent on the counts of burglary with credit

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[1] *See* Attachment 1, Verdict Form.

for 204 days. For the counts of Sexual Battery, Defendant was sentenced to life imprisonment on each count, concurrent, with credit for 204 days.[2] On the Petit Theft, Defendant was sentenced to time served.[3]

The rules of criminal procedure require a defendant to file a motion for postconviction relief within two years after the judgment and sentence under attack become final. *See* Rule 3.850(b). A sentence becomes final for the purposes of rule 3.850 when direct review proceedings are concluded and jurisdiction to entertain a motion for postconviction relief returns to the trial court. *See generally Jones v. State*, 602 So. 2d 606 (Fla. 1st DCA 1992). Rule 3.850 recognizes only three exceptions to the two-year time limitation. They are as follows: 1) the facts on which the claim is based were not known to Defendant or his counsel and could not have been ascertained through due diligence, 2) the fundamental constitutional right asserted was not established within the period provided for and has been held to apply retroactively, and 3) Defendant retained counsel to file a 3.850 motion and counsel, through neglect, failed to do so. *See* Fla. R. Crim. Pro. 3.850.

The rules of criminal procedure further state that "A second or successive motion may be dismissed if the judge finds that . . . the failure of the movant or the attorney to assert those grounds in a prior motion

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[2] *See* Attachment 2, Judgment.

[3] *See* Attachment 3, Certified Copy of the Docket.

constituted an abuse of the procedure governed by these rules." Fla. R. Crim. Pro. 3.850(f). Postconviction 3.850 motions may be "barred as successive where the 'defendant's current rule 3.850 motion is one that could have or should have been raised in his first rule 3.850 motion.'" *Franklin v. State*, 923 So. 2d 1199 (Fla. 3rd DCA 2006) *quoting Scrambling v. State*, 919 So. 2d 671 (Fla. 5th DCA 2006). *See also Moore v. State*, 820 So. 2d 199 (Fla. 2002).

In the instant case, Defendant was sentenced on December 12, 1989. The First District Court of Appeal affirmed Defendant's judgment and sentence on June 10, 1991, giving Defendant until approximately June of 1993 to file a motion for postconviction relief pursuant to rule 3.850. Such a motion was filed in October of 1992. It was dismissed, and Defendant was allowed to refile. He did so in March of 1993. That motion was denied in January of 1996.[4]

Consequently, at this time, the Court may address Defendant's claims only if they fall into the enumerated exceptions to the two-year time limitation *and* could not have been raised in Defendant's original 3.850 motion. Defendant's claim under *Roper* could not have been raised in his original 3.850 motion because his motion was filed many years before the United States' Supreme Court ruled on *Roper*, thereby escaping dismissal based on successiveness. However, the Court finds that the claim

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[4] *See* Attachment 3.

raised in the instant motion, based on *Roper*, does not fit into the limited category of claims allowed to be brought after the expiration of the two-year filing period.

In the instant motion, Defendant argues that the United States' Supreme Court's decision in *Roper* should disallow the sentencing of juvenile offenders to life in prison without parole. Defendant committed his crime when he was thirteen years of age, and the Court sentenced him to "die in prison." Defendant argues that in light of *Roper*, his sentence should be mitigated.

As mentioned above, the three exceptions to the two-year limitation on a postconviction 3.850 motion are 1) the facts on which the claim is based were not known to Defendant or his counsel and could not have been ascertained through due diligence, 2) the fundamental constitutional right asserted was not established within the period provided for and has been held to apply retroactively, and 3) Defendant retained counsel to file a 3.850 motion and counsel, through neglect, failed to do so. *See* Fla. R. Crim. Pro. 3.850.

Because new law cannot qualify as newly discovered evidence, *see Regan v. State*, 787 So. 2d 265, 267 (Fla. 1st DCA 2001), and Defendant has given the Court no reason to believe that his counsel neglected to file a 3.850, the only exception under which Defendant's claim could fall is the second: the law has established a new, fundamental, retroactive constitutional

right. Defendant argues in his motion that "after the United States Supreme Court's decision in *Roper* it is unconstitutional to sentence a thirteen-year-old child to die in prison." However, *Roper* has established no such constitutional right. Rather, *Roper* established only one new constitutional right, the right for a juvenile not to be given the death penalty. *See Melton v. State*, 949 So. 2d 994, 1020 (Fla. 2006) (noting that "[i]n *Roper*, the United States Supreme Court held that '[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.' *Roper*, 543 U.S. at 578. The Court provided a bright line rule for the imposition of the death penalty itself, but nowhere did the Supreme Court extend this rule" beyond that bright line). Because *Roper* did not establish the constitutional right Defendant alleges, Defendant does not have a valid constitutional claim. Hence, Defendant's claim does not fit into any exception to the time limits in rule 3.850 and must be dismissed as procedurally barred.

Even if Defendant's motion were properly before the Court, Defendant's argument is meritless. Although Defendant's motion includes many references to sociological sources, counsel has not provided the Court any legal authority for Defendant's proposed reading of *Roper*. Furthermore, the Court can find no controlling legal authority supporting Defendant's argument. Rather, this Court has found that the Supreme Court of Florida has repeatedly declined to extend the implications of *Roper* beyond its clear,

bright-line rule. *See Grossman v. State*, 932 So. 2d 192 (Fla. 2006) (declining to extend *Roper* to a nineteen-year-old offender) and *Kearse v. State*, 2007 Fla. LEXIS 1534 (Fla. 2007) (declining to extend Roper to an offender who was eighteen years and three months old). *See also England v. State*, 940 So. 2d 389 (Fla. 2006) (declining to extend *Roper* to defeat death penalty that used juvenile offenses as aggravators). Additionally, the Supreme Court of Florida has made clear that a sentence of life imprisonment without parole is a perfectly acceptable penalty under *Roper*. *See Ramirez v. State*, 909 So. 2d 862 (Fla. 2005) *citing* section 775.082(1) & (2), Florida Statutes (Supp. 1994). Consequently, the Court can find no grounds for mitigating Defendant's sentence.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's *pro se* Motion for Postconviction Relief is **DISMISSED WITH PREJUDICE**; and

2. Defendant has thirty (30) days from the date of this order to file a notice of appeal, should he so choose.

DONE and **ORDERED** in Chambers at Pensacola, Escambia County, Florida, this 31st day of October, 2007.

/s/ Frank L. Bell
FRANK L. BELL
CIRCUIT JUDGE

Copies to:

- Joe Sullivan, DC # 118643, Columbia Correctional Institution, 216 S.E. Corrections Way, Lake City, FL 32025
- Sonya Rudenstine, Esq., 1221 N.E. 3rd Street, Gainesville, FL 32601
- Equal Justice Initiative of Alabama, Attn: Bryan Stevenson, Esq., Randall Susskind, Esq., and Rebecca Kiley, Esq., 122 Commerce Street, Montgomery, AL 36104
- ASA, Division B, Office of the State Attorney

ATTACHMENT 1

IN THE CIRCUIT COURT IN AND
FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 89-2693-B

JOE HARRIS SULLIVAN,

Defendant. /

VERDICT

(Filed Nov. 16, 1989)

WE, THE JURY, find the Defendant, Joe Harris Sullivan, as follows as to COUNT ONE of the indictment:

_____ Guilty of Burglary while Armed as charged in the State's indictment

__✓__ Guilty of Burglary of a Dwelling, a lesser included offense

_____ Guilty of Trespass while Armed with a Dangerous Weapon, a lesser included offense

_____ Guilty of Trespass of an Occupied Dwelling, a lesser included offense

_____ Guilty of Trespass of a Structure, a lesser included offense

_____ Not Guilty

WE, THE JURY, find the Defendant, Joe Harris Sullivan, as follows as to COUNT TWO of the indictment:

__✓__ Guilty of Sexual Battery as charged in the State's indictment

_____ Guilty of Battery, a lesser included offense

_____ Not Guilty

WE, THE JURY, find the Defendant, Joe Harris Sullivan, as follows as to COUNT THREE of the indictment:

__✓__ Guilty of Sexual Battery as charged in the State's indictment

_____ Guilty of Battery, a lesser included offense

_____ Not Guilty

_____

ATTACHMENT 2

☐ PROBATION VIOLATOR *(Check if Applicable)*

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA

DIVISION 'B'

CASE NUMBER 89-2693-CFA4S-01

STATE OF FLORIDA

-vs-

JOE HARRIS SULLIVAN
Defendant

JUDGMENT

(Filed Dec. 12, 1989)

The Defendant, JOE HARRIS SULLIVAN, being personally before this Court represented by M. Plant, Court appointed, his attorney of record, and having:

☒ Been tried and found guilty of the following crime(s)

(Check if Applicable)

☐ Entered a plea of guilty of the following crime(s)

☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
1	BURGLARY OF DWELLING	810.02(3)	F2	
2	SEXUAL BATTERY	794.011(3)	F1 Life	
3	SEXUAL BATTERY	794.011(3)	F1 Life	
4	BURGLARY OF DWELLING	810.02(3)	F2	

and no cause having been shown why the Defendant should not be adjudicated guilty. IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

****

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

(Check if Applicable)

☐ The Defendant is further ordered to pay an additional two ($2.00) pursuant F.S. 943.25(8) (This provision is optional; not applicable unless checked).

☐ The Court hereby imposes a fine in the sum of $_____

NOTE: This page is to be completed ONLY where sentence is stayed and withheld or deferred until a later date.

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*	☐ The Court hereby stays and withholds the imposition of sentence and places the defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order).
Sentence Deferred *(Check if Applicable)*	☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant(s entitlement to the assistance of counsel in taking said appeal at the expense of the State upon showin [sic] of indigency.

/s/ Nickolas P. Geeker
JUDGE

[Fingerprints Of Defendant Omitted In Printing]

Fingerprints taken by:

/s/ [Illegible] #652 Deputy Sheriff
Name and Title

DONE AND ORDERED in Open Court at ESCAMBIA County, Florida, this 12th day of December A.D. 1989. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, JOE HARRIS SULLIVAN and that they were placed thereon by said Defendant in my presence in Open Court this date.

/s/ Nickolas P. Geeker
JUDGE

Defendant JOE HARRIS SULLIVAN

Case Number 89-2693-CFA4S-01

SENTENCE

(As to Count 1 & 4)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown.

(Check either provision if applicable)

☐ and the Court having on _____ (*date*) deferred imposition of sentence until this date,

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

☒ The Department of Corrections of the State of Florida, or

☐ The Sheriff* of ESCAMBIA County, Florida
(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of 15 years each count concurrent

☐ For an Indeterminate period of 6 months to _____ years.

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these 2 paragraphs

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

******SPECIAL PROVISIONS******

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm – 3 year mandatory minimum	☐	It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.
Drug Trafficking – mandatory minimum	☐	It is further ordered that the ___ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.
Retention of Jurisdiction	☐	The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.
Habitual Offender	☐	The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Jail Credit	☒	It is further ordered that the Defendant shall be allowed a total of 204 days credit for such time as he has been incarcerated prior to imposition

of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/ Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☐ concurrent (check one) to the sentence set forth in count _____ above.

Defendant JOE HARRIS SULLIVAN

Case Number 89-2693-CFA4S-01

SENTENCE

(As to Count 2 & 3)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown.

(Check either provision if applicable)

☐ and the Court having on _____ (*date*) deferred imposition of sentence until this date,

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

☒ The Department of Corrections of the State of Florida, or

☐ The Sheriff* of ESCAMBIA County, Florida
(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of LIFE IMPRISONMENT each count concurrent

☐ For an Indeterminate period of 6 months to _____ years.

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these 2 paragraphs

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

******SPECIAL PROVISIONS******

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm – 3 year mandatory minimum	☐	It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.
Drug Trafficking – mandatory minimum	☐	It is further ordered that the ___ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.
Retention of Jurisdiction	☐	The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.
Habitual Offender	☐	The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Jail Credit	☒	It is further ordered that the Defendant shall be allowed a total of 204 days credit for such time as he has been incarcerated prior to imposition

of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/ Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☒ concurrent (check one) to the sentence set forth in counts 1 & 4 above.

Defendant JOE HARRIS SULLIVAN

Case Number 89-2693-CFA4S-01

Consecutive/Concurrent (AS to other convictions)

it is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ___ consecutive to ___ concurrent with (check one) the following:

___ Any active sentence being served.

___ Specific sentences: _____

_____

_____

_____

In the event the above sentence is to the Department of Corrections, the Sheriff of ESCAMBIA County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further Orders Defendant to make restitution as determined by probation and parole.

DONE AND ORDERED in Open Court at ESCAMBIA County, Florida, this 12th of December A.D., 1989.

/s/ Nickolas P. Geeker
JUDGE

ATTACHMENT 3

[Certified Copy Of The Docket Omitted From Printing; The Docket Appears At Page 1 Of This Joint Appendix.]

IN THE DISTRICT
COURT OF APPEAL
FIRST DISTRICT,
STATE OF FLORIDA

JOE SULLIVAN,
Appellant,
v.
STATE OF FLORIDA,
Appellee.
/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D07-6433

Opinion filed June 17, 2008.

An appeal from the Circuit Court for Escambia County.

Frank L. Bell, Judge.

Rebecca Kiley of Equal Justice Initiative of Alabama, Montgomery, Alabama, and Sonya Rudenstine, Gainesville, for Appellant.

Bill McCollum, Attorney General, and Joshua R. Heller, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

WOLF, LEWIS, and ROBERTS JJ., CONCUR.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

August 6, 2008

CASE NO.: 1D07-6433
L.T. No.: 89-2693

Joe Sullivan	v.	State Of Florida
Appellant/Petitioner(s),		Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed July 2, 2008, for rehearing, rehearing en banc and certification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Sonya Rudenstine
Joshua R. Heller, A.A.G.

Rebecca Kiley
Randall Susskind
Bryan A. Stevenson
Hon. Bill McCollum, A.G.

jm

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK

[SEAL]

MANDATE

From

DISTRICT COURT OF APPEAL OF FLORIDA

FIRST DISTRICT

To the Honorable Judges of the Circuit Court for Escambia County

WHEREAS, in the certain cause filed in this Court styled:

JOE SULLIVAN Case No : 1D07-6433

v. Lower Tribunal Case No : 89-2693

STATE OF FLORIDA

The attached opinion was issued on June 17, 2008

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

WITNESS the Honorable EDWIN B. BROWNING, JR.

of the District Court of Appeal of Florida, First District,

and the Seal of said Court done at Tallahassee, Florida,

on this 22nd day of August 2008.

/s/ Jon S. Wheeler
JOHN S. WHEELER, Clerk
District Court of Appeal of
Florida, First District

[SEAL]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 4, 2009

Mr. Bryan A. Stevenson
Equal Justice Initiative of Alabama
122 Commerce Street
Montgomery, AL 36104

Re: Joe Harris Sullivan
v. Florida
No. 08-7621

Dear Mr. Stevenson:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

133

(1)

No. 08-7621

Supreme Court, U.S.
FILED
JUL 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In all of the United States, only nine human beings are incarcerated under sentences of life imprisonment without the possibility of parole for crimes committed at or before the age of 13. Only two of them are serving this sentence for non-homicide crimes, both in Florida. Petitioner Joe Sullivan is one of the two. The rarity of this kind of punishment for the Nation's youngest teenagers is demonstrated by the fact that, even when sentences for crimes committed by 14-year-olds are added, only 73 individuals in the United States are being held in prison for the remainder of their lives with no chance of ever being considered for release on parole. Is Joe Sullivan's sentence a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT: THE CONSTITUTIONAL LOGIC OF *ROPER V. SIMMONS* CONTROLS THIS CASE AND REQUIRES THE INVALIDATION OF A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED ON A 13-YEAR-OLD CHILD	8
A. How the Reasoning of *Roper* Applies to Young Adolescents Sentenced to Life Imprisonment Without Parole	11
1. The Scientific Consensus on Adolescent Development	12
a. Young Adolescents Have Not Yet Developed the Capacity to Make Mature and Responsible Decisions	14
b. Young Adolescents Are Especially Susceptible to Risk-Taking Impulses and Negative Peer Influences	19

TABLE OF CONTENTS – Continued

Page

c. Young Adolescents Have Not Yet Begun to Form Their Own Identities or to Imagine Their Futures 22

2. The Constitutional Significance of Young Adolescents' Diminished Cognitive Capacity and Psychosocial Immaturity 25

B. Hundreds of State and Federal Laws Recognize the Special Vulnerabilities and Deficiencies of Young Adolescents..... 30

1. State and Federal Law Recognizes That Young Adolescents Are Especially Vulnerable and Provides Heightened Protection from Exploitation and Abuse 32

2. State and Federal Law Recognizes That Early Adolescents Are Immature, Impulsive, and Relatively Irresponsible, as Well as That They Are Exceedingly Susceptible to Coercion, by Limiting Their Rights and Responsibilities in Many Aspects of Life 34

C. The Distinct Characteristics of Young Adolescents Recognized in State, Federal, and Constitutional Law Undermine the Legitimacy and Utility of Life-Without-Parole Sentences for Young Teens 36

1. Some of These Characteristics Bear Directly on the Degree of Culpability That Is Appropriate to Attach to Adolescent Criminal Behavior 37

TABLE OF CONTENTS – Continued

Page

2. Some of These Characteristics Bear on the Inutility of Life Without Parole as a Deterrent 37

3. Some of These Characteristics Bear on the Risks of Wrongful Conviction (Or Degree of Conviction) and on the Even More Serious Risks of Erroneous Judgment Regarding Appropriate Sentence 38

4. The Severe, Terminal Sanction of Life Without Parole Is Inappropriate for Young Adolescents Because the Retributive, Deterrent, and Incapacitative Virtues of Such a Punishment Are Attenuated in Their Cases 41

D. Objective Indicia Demonstrate That There Is a Consensus Against Imposing Sentences of Life Imprisonment Without Parole upon Young Adolescents 42

1. Life Without Parole for Young Adolescents Is an Unconsidered Consequence of Two Distinct Legislative Developments 44

2. No State That Has Expressly Addressed the Question of the Minimum Age of Eligibility for a Life-Without-Parole Sentence Has Set the Age as Low as 13 47

TABLE OF CONTENTS – Continued

Page

3. In Actual Practice, the Imposition of a Life-Without-Parole Sentence on a Young Teenager Is an Aberrant, Vanishingly Rare Occurrence 49

E. Appropriate Categorical Lines Can Readily Be Drawn 57

CONCLUSION 62

APPENDIX A ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Anders v. California, 386 U.S. 738 (1967) 2

Atkins v. Virginia, 536 U.S. 304 (2002) .....*passim*

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Page

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Ala. Code § 13A-5-40(a)(15).....32

Ala. Code § 13A-6-67 33

Ala. Code § 13A-6-69 33

Ala. Code § 15-25-2.....34

Ala. Code § 15-25-3.....34

Ala. Code § 27-14-5.....35

TABLE OF AUTHORITIES – Continued

Page

Ala. Code § 32-5A-191(n) 32
Ala. Code § 32-5-222 32
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Ariz. Rev. Stat. Ann. § 28-1383(A)(3) 32
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Ark. Code Ann. § 5-10-101(a)(9) 32
Ark. Code Ann. § 5-14-102 33
Ark. Code Ann. § 5-65-111 32
Ark. Code Ann. § 9-27-318 50
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Cal. Penal Code § 209(a) 48
Cal. Penal Code § 653 31
Colo. Rev. Stat. § 10-4-104 35
Colo. Rev. Stat. § 17-22.5-104(2)(d)(IV) 47
Colo. Rev. Stat. § 18-1-503.5 33
Conn. Gen. Stat. Ann. § 46b-127 50
Conn. Gen. Stat. Ann. § 53a-35a 50

TABLE OF AUTHORITIES – Continued

Page

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Conn. Gen. Stat. Ann. § 53a-54b(8) 32
D.C. Code § 22-2104 48
Del. Code Ann. tit. 10, § 1010 49
Del. Code Ann. tit. 11, § 4209 ..... 32, 49
Fla. Stat. § 39.02 ..... 2, 47
Fla. Stat. § 921.001 44
Fla. Stat. Ann. § 775.082 ..... 44, 49
Fla. Stat. Ann. § 794.05 33
Fla. Stat. Ann. § 800.04 33
Fla. Stat. Ann. § 985.557 49
Fla. Stat. Ann. § 985.56(1) 2, 47, 49
1969 Fla. Laws, ch. 146, § 1 47
1983 Fla. Laws, ch. 87, § 2 44
1995 Fla. Laws, ch. 294, § 4 44
Fla. R. Crim. P. 3.850(b) 3, 4
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Ga. Code Ann. § 16-3-1 49
Ga. Code Ann. § 16-5-1(d) 49
Ga. Code Ann. § 16-6-3 33
Ga. Code Ann. § 16-6-5 33
Haw. Rev. Stat. Ann. § 571-22 49
Haw. Rev. Stat. Ann. § 706-656(1) 49

TABLE OF AUTHORITIES – Continued

Page

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Idaho Code Ann. § 18-4004 49
Idaho Code Ann. § 20-509(1) 49
705 Ill. Comp. Stat. Ann. 405/5-130 49
720 Ill. Comp. Stat. Ann. 5/10-5.1 33
730 Ill. Comp. Stat. Ann. 5/5-8-1 ..... 48, 49
Ind. Code § 35-50-2-3 48
Iowa Code § 232.45(6)(a) 50
Iowa Code § 902.1 50
Kan. Stat. § 21-4622 48
Ky. Rev. Stat. § 640.040 48
La. Child. Code Ann. art. 857(B) 47
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Mass. Gen. Laws ch. 119, § 74 50
Mass. Gen. Laws ch. 265, § 2 50
Md. Code Ann., Crim. Law § 2-201 49
Md. Code Ann., Crim. Law § 2-202 ..... 48, 49
Md. Code Ann., Crim. Law § 2-203 49
Md. Code Ann., Crim. Law § 2-304 49
Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06 49
Me. Rev. Stat. Ann. tit. 15, § 3101 49
Me. Rev. Stat. Ann. tit. 17-A, § 1251 49
Mich. Comp. Laws § 500.2205 35

TABLE OF AUTHORITIES – Continued

Page

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Mich. Comp. Laws § 750.316 49
Mich. Comp. Laws § 791.234(6)(a).....49
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Minn. Stat. Ann. § 609.106.....50
Miss. Code Ann. § 43-21-151(3).....49
Miss. Code Ann. § 43-21-157 49
Miss. Code Ann. § 97-3-21 49
Mo. Ann. Stat. § 211.071 49
Mo. Ann. Stat. § 294.011 34
Mo. Ann. Stat. § 294.021 34
Mo. Ann. Stat. § 294.030 34
Mo. Ann. Stat. § 307.179(2).....32
Mo. Ann. Stat. § 491.075 34
Mo. Ann. Stat. § 565.020 49
Mo. Ann. Stat. § 566.020 33
Mo. Ann. Stat. § 566.034 33
Mont. Code Ann. § 41-5-206(1).....49
Mont. Code Ann. § 45-5-102 49
N.C. Gen. Stat. Ann. § 7B-2200 50
N.C. Gen. Stat. Ann. § 14-17 .....48, 50
N.C. Gen. Stat. Ann. § 15A-1371(a1) (West 1988) 51

TABLE OF AUTHORITIES – Continued

Page

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N.D. Cent. Code § 12.1-32-01 50
N.H. Rev. Stat. Ann. § 169-B:24 49
N.H. Rev. Stat. Ann. § 628:1 49
N.H. Rev. Stat. Ann. § 630:1-a 49
N.J. Stat. Ann. § 2A:4A-26 50
N.J. Stat. Ann. § 2C:11-3 ..... 48, 50
N.M. Stat. Ann. § 31-18-14 50
N.M. Stat. Ann. § 32A-2-3 50
N.M. Stat. Ann. § 32A-2-20 50
N.Y. Educ. Law § 281 35
Neb. Rev. Stat. Ann. § 28-105 49
Neb. Rev. Stat. Ann. § 28-303 49
Neb. Rev. Stat. Ann. § 28-311 33
Neb. Rev. Stat. Ann. § 43-247 49
Nev. Rev. Stat. Ann. § 62B.330 49
Nev. Rev. Stat. Ann. § 94.010 49
Nev. Rev. Stat. Ann. § 176.025 48
Nev. Rev. Stat. Ann. § 200.030 49
Ohio Rev. Code Ann. § 2152.10 50
Ohio Rev. Code Ann. § 2929.03 ..... 48, 50
Okla. Stat. Ann. tit. 10, § 7306-1.1 50

TABLE OF AUTHORITIES – Continued

Page

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Or. Rev. Stat. § 61.620 48
18 Pa. Cons. Stat. Ann. § 2901 32
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R.I. Gen. Laws § 14-1-7 50
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S.C. Code Ann. § 44-34-60 31
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TABLE OF AUTHORITIES – Continued

Page

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Va. Code Ann. § 18.2-10 .....49, 50
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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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OPINIONS BELOW

The decision of the District Court of Appeal of Florida, First District, is a *fiat* order reported at 987 So. 2d 83 (table). It appears in the Joint Appendix at J.A. 73. That court's denial of rehearing, rehearing en banc, and certification to the Florida Supreme Court is unreported. It is found at J.A. 74. The order and judgment of the Circuit Court of Florida for the First Judicial Circuit is unreported and is reproduced at J.A. 54-72.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the District Court of Appeal was entered June 17, 2008. On August 6, 2008, that court denied a timely motion for rehearing, rehearing en banc, and certification to the Supreme Court of Florida. Because the district court of appeal affirmed without opinion, Florida law did not permit further review. *Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006). On October 22, 2008, Justice Thomas extended the time for filing a petition for certiorari until December 4, 2008. The petition was filed on that date.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Joe Sullivan was arrested in 1989 at the age of 13 and indicted as an adult[1] for sexual battery in Florida. J.A. 1, 21, 26. After a one-day trial, he was convicted by a six-person jury and sentenced to life imprisonment with no possibility of parole. J.A. 4, 62-63, 69. He was sent to state prison. J.A. 66, 69. Appointed appellate counsel filed an *Anders*[2] brief and withdrew.[3] The Florida First District Court of

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[1] Florida law requires direct indictment in adult criminal court of a child of any age charged with a serious felony. Fla. Stat. Ann. § 985.56(1) (codified in 1989 at Fla. Stat. § 39.02(c)(1)).

[2] *Anders v. California*, 386 U.S. 738, 744 (1967).

[3] *Sullivan v. State*, No. 1D90-190 (Fla. Dist. Ct. App.) (docket entry for Dec. 4, 1990), *available at* http://199.242.69.70/

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Appeal affirmed the conviction without opinion. *Sullivan v. State*, No. 1D90-190, 580 So. 2d 755 (table) (Fla. Dist. Ct. App. May 22, 1991). The Florida Supreme Court dismissed review without opinion. *Sullivan v. State*, No. 78,050, 583 So. 2d 1037 (table) (Fla. June 12, 1991).

With no lawyer, Joe made several unsuccessful efforts to challenge his conviction. J.A. 10-12.[4] Then, after this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), he filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, contending through counsel that *Roper* rendered his life-without-parole sentence federally unconstitutional. J.A. 21-53. On October 31, 2007, the trial court dismissed the motion with prejudice in a five-page order. J.A. 54-59.

Regarding the substance of the Eighth Amendment claim, the trial court concluded that Joe's invocation of *Roper* "is meritless," citing cases in which the Florida Supreme Court declined to extend *Roper*.[5] J.A. 58-59. The court reasoned that "the

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[4] In 2007, his motion for DNA testing was denied after a finding that the State of Florida had destroyed all biological evidence collected in the case. J.A. 16, 24, 26, 36.

[5] *Grossman v. State*, 932 So. 2d 192 (Fla. 2006) (table), and *Kearse v. State*, 969 So. 2d 976 (Fla. 2007) (declining to extend *Roper* to defendants 18 and older); *Melton v. State*, 949 So. 2d 994, 1020 (Fla. 2006), and *England v. State*, 940 So. 2d 389, 406-07 (Fla. 2006) (declining to find that *Roper* prevents

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Supreme Court of Florida has made clear that a sentence of life imprisonment without parole is a perfectly acceptable penalty under *Roper*."[6] J.A. 59. Reading *Roper* as limited to capital sentences, it found that "[b]ecause *Roper* did not establish the constitutional right Defendant alleges, Defendant does not have a valid constitutional claim." J.A. 58.

The Florida First District Court of Appeal summarily affirmed without opinion, J.A. 73, and denied rehearing, rehearing en banc, and certification to the Florida Supreme Court. J.A. 74. In this posture of the case, Florida law precluded review by the state Supreme Court. *Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006). On December 4, 2008, a petition for certiorari was filed with this Court. On May 4, 2009,

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consideration of juvenile convictions when imposing death sentence on adult defendant). The court held alternatively that Joe's petition was time-barred by the two-year statute of limitations in Fla. R. Crim. P. 3.850(b). It recognized that the petition would come within an express exception to the bar, provided by Rule 3.850(b)(2), if "the law has established a new, fundamental, retroactive constitutional right" supporting Joe's claim, J.A. 57-58; it recognized that Joe was relying on *Roper* as establishing such a right, J.A. 58; but it held that "*Roper* has established no such constitutional right" because, as it read *Roper*, "*Roper* established only one new constitutional right, the right for a juvenile not to be given the death penalty," J.A. 58.

[6] The court relied on *Ramirez v. State*, 909 So. 2d 862 (Fla. 2005) (table), which involved a 17-year-old convicted of first-degree murder and sentenced to life *with* the possibility of parole. *See State v. Ramirez*, 850 So. 2d 620 (Fla. Dist. Ct. App. 2003); *id.* at 623 (Fulmer, J., dissenting) (noting age at offense).

the Court granted it and authorized the case to proceed *in forma pauperis*. J.A. 76.

SUMMARY OF THE ARGUMENT

The constitutional logic of *Roper v. Simmons* controls this case and requires the invalidation of a sentence of life imprisonment without parole imposed on a 13-year-old child. To be sure, *Roper* dealt with a death sentence, and death is different from lesser sentences in many ways that are relevant to Eighth Amendment analysis. But life without parole is also different from lesser sentences in important ways. And it is precisely in regard to those specific matters which were central to *Roper*'s Eighth Amendment reasoning that life without parole is most akin to death and most unlike sentences of imprisonment from which release is possible, either on parole or following a term of years.

The essential feature of a death sentence or a life-without-parole sentence is that it imposes a terminal, unchangeable, once-and-for-all judgment upon the whole life of a human being and declares that human being forever unfit to be a part of civil society. *Roper* understood and explained why such a judgment cannot rationally be passed on children below a certain age. They are unfinished products, human works-in-progress. They stand at a peculiarly vulnerable moment in their lives. Their potential for growth and change is enormous. Almost all of them

will outgrow criminal behavior, and it is practically impossible to detect the few who will not. To date they are the products of an environment over which they had no real control – passengers through narrow pathways in a world they never made.

The age at which it becomes conceivable to pass a valid final judgment that a growing child deserves or requires lifelong incarceration as a criminal depends in part upon facts about adolescent neurological, psychological, and social development. It depends in part, also, upon the ways in which the law ordinarily regulates children's lives and recognizes their need for differing degrees of protection at different ages. When these developmental facts and legal regulations are examined through the sources and methods taught by *Roper*, it becomes clear that the entry of irrevocable judgment on a child of 13, condemning him or her to be imprisoned until death, is impermissible.

There is more than one age above 13 at which the precise constitutional line could be drawn. In drawing it, *Roper* instructs the Court to take account of the extent to which contemporary standards of decency, evidenced by objective indicia, accept or reject the use of life-without-parole sentences to punish the crimes of children of various ages. Whatever may be the case for older children, life imprisonment without parole sentences for children of 13 are so vanishingly rare as to make their repudiation by contemporary American society unmistakable.

There are only nine individuals in this country serving life-without-parole sentences for crimes committed at age 13. Indeed, when crimes committed by 14-year-olds are added to those committed by 13-year-olds, the total number of individuals serving life-without-parole sentences rises to only 73. These numbers are all the more revealing when two circumstances are considered. The first is that, by their nature, life-without-parole sentences progressively accumulate. The numbers 9 and 73 are nationwide totals that are the end product of more than a quarter-century's accumulation. Second, during that period, huge numbers of 13- and 14-year-olds have been convicted of crimes for which a life-without-parole sentence could have been imposed but was not.

We will see that the eligibility of these persons for a life-without-parole sentence is not the result of legislative decisions that life in prison without parole is appropriate for children in this age range but rather results from the adventitious overlay of two legislative developments – legislation changing the boundaries of exclusive juvenile-court jurisdiction so as to make more children subject to adult-court prosecution; and legislation increasing the number of adult crimes punishable by life imprisonment without parole. The fact that, despite these developments, the total national accumulation of life-without-parole sentences for 13-year-olds has been only nine – and that even when 14-year-olds are added it has been only 73 – is as striking a demonstration as can be

imagined of the country's radical repudiation of life without parole for children of this age. And this repudiation is world-wide. Outside of the United States, life-without-parole sentences for adolescents are virtually unknown.

ARGUMENT

THE CONSTITUTIONAL LOGIC OF *ROPER V. SIMMONS* CONTROLS THIS CASE AND REQUIRES THE INVALIDATION OF A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED ON A 13-YEAR-OLD CHILD.

"By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). Consistently with this basic understanding, *Roper* endorsed the Court's earlier teachings that a punishment is "cruel and unusual" for Eighth Amendment purposes if there is a general societal consensus against its imposition or if it affronts the basic concept of human dignity at the core of the Amendment because it is disproportionate to the moral culpability of the offender. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

Roper also followed the Court's earlier precedents in gauging consensus by a thorough-going review of objective indicia, including legislative enactments and the actual practice of decisionmakers in the

criminal justice system. 543 U.S. at 564. With regard to the sentencing of children, the Court noted, as in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the importance of taking into account whether state statutes which had the effect of exposing children to a particular sentence actually reflected a specific legislative judgment that the sentence in question was appropriate for children of that age. *Roper*, 543 U.S. at 561. And *Roper* focused on the "rarity" of imposition of the sentence in actual practice, *id.* – "the infrequency of its use even where it remains on the books," *id.* at 567 – as a crucial indicator of a cruel and unusual punishment. *Roper*, 543 U.S. at 561, 563, 564-65; *see also Thompson,* 487 U.S. at 832-33 (plurality opinion); *Atkins v. Virginia*, 536 U.S. 304, 314-16 (2002).

But, "[t]he inquiry into our society's evolving standards of decency did not end there." *Roper*, 543 U.S. at 563. In examining the permissibility of applying to children a punishment which, though harsh, was constitutionally acceptable for adults, the Court consulted scientific evidence about children's biological and psychosocial development (*id.* at 569-71), the views expressed by "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," (*id.* at 563 [quoting the *Thompson* plurality opinion, 487 U.S. at 830]), and the Court's "own independent judgment" (*Roper*, 543 U.S. at 564). These perspectives bore on the questions whether the special circumstances of

childhood "diminish[] personal culpability" in ways that "make it less defensible" to impose a particular punishment as fitting retribution (*id.* at 563; *see id.* at 569-70) and whether the punishment is "less likely" to have "a real deterrent effect" (*id.* at 563 [citing *Atkins*, 536 U.S. at 319-20]; *see also Roper*, 543 U.S. at 571-72). *And see id.* at 561-62 (discussing the *Thompson* plurality's conclusions that the death penalty for young adolescents was inappropriate as retribution because of the "lesser culpability of offenders under 16" and that "the low likelihood that offenders under 16 engaged in 'the kind of cost-benefit analysis that attaches any weight to the possibility of execution' made the death penalty ineffective as a means of deterrence" [quoting passages from 487 U.S. at 836-38]).

All of these considerations led the Court in *Roper* to conclude that "today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Objective indicia (including the pervasiveness of legislation prohibiting juveniles from voting, serving on juries, or marrying without parental consent because of their "comparative immaturity and irresponsibility" [*Roper*, 543 U.S. at 569 and Appendices B-D]) pointed to this conclusion, as did the Court's recognition (shared by parents and neuroscientists alike), that adolescents as a class exhibit distinct characteristics – "lack of maturity and underdeveloped sense of responsibility," vulnerability to outside pressures and influences, and

changeability – which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569-70.

A. How the Reasoning of *Roper* Applies to Young Adolescents Sentenced to Life Imprisonment Without Parole.

This Court recognized in *Roper* that the constitutional vice involved in punishing children with death was the impropriety of passing a final, condemnatory judgment on a still unformed human being. 543 U.S. at 570. Because a child is not yet what he will be, "the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 574. It violates "the duty of the government to respect the dignity of all persons" (*id.* at 560) when an unrelenting, changeless sentence is imposed upon a child whose character, identity, body and brain are in the process of changing radically. This is so because the need for such a sentence cannot be determined with any reliability while the child's character is still in flux. And it is all the more so because children's "struggle to define their identity" (*id.* at 570) *is* a struggle, bringing with it unique, temporary impairments and vulnerabilities that reduce criminal culpability to a level which cannot justify the forfeiture of their entire future lives. Everything we know about early adolescence, in particular, warns that it is both impracticable and excessively censorious to pass an unalterable sentence upon a child of 13, like Joe Sullivan,

declaring that he or she will be forever unfit to live in society.

1. The Scientific Consensus on Adolescent Development

Contemporary neurological, psychological, and sociological studies converge to demonstrate that the factors which *Roper* recognized as critical for Eighth Amendment analysis in the case of children – changeability, immature judgment, an under-developed capacity for self-regulation and responsibility, vulnerability to negative influences and outside pressures, and a lack of control over either their own impulses or their environment – are at their peak in young teens, for whom the developmental period of adolescence has just begun. Generally considered to encompass ages 12 to 17 or 18, adolescence is defined by radical transformation, including the obvious and oft-distressing physical changes associated with puberty (increases in height and weight and sex-related changes) as well as progressive gains in capacity for reasoned, mature judgment, impulse control, and autonomy.[7] A "rapid

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[7] Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 Pharmacol. Biochem. Behav. 212, 212 (2009); *see also* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 417 (2000) ("[A]dolescence is of its essence, a period of transitions rather than a moment of attainment."); *id.* at 434 (discussing radical hormonal changes in adolescence).

and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[8] "The temporal gap between the arousal of the socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk taking during middle adolescence."[9]

These biological and psychosocial developments explain what is obvious to parents, teachers, and any adult who reflects back on his or her own teenage years: 13- and 14-year-old middle-schoolers lack the maturity, independence, and future orientation that older teens and adults have acquired over the course of adolescence. While 16- and 17-year-olds are working after-school jobs to save up for their first car and applying to college, 13- and 14-year-olds are

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[8] Laurence Steinberg, Elizabeth Cauffman et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report*, 44 Dev. Psychol. 1764, 1764 (2008).

[9] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

agonizing about who will sit with them at lunch. Graduating seniors are thinking about their future careers and families, while seventh-graders are fixated on who will be their "BFF"[10] that day. Among adolescents, young teens have the least capacity to imagine consequences, regulate their wildly-shifting emotions, and resist peer pressure, and the most capacity for change, precisely because they are at the beginning of the most intense period of rapid growth in their lifetimes.[11]

a. Young Adolescents Have Not Yet Developed the Capacity to Make Mature and Responsible Decisions.

Relative to that of adults and even older adolescents, young teenage judgment is handicapped in nearly every conceivable way: young adolescents lack life experience and background knowledge to inform their choices; they struggle to generate options and to imagine consequences; and, perhaps for good reason, they lack the necessary self-confidence to

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[10] Text message shorthand for, ironically, "Best Friends Forever." NetLingo.com, *List of Acronyms & Text Message Shorthand*, http://www.netlingo.com/acronyms.php (last visited July 15, 2009).

[11] "[A]dolescence is second only to the neonatal period in terms of both rapid biopsychosocial growth as well as changing environmental characteristics and demands . . . ." Spear, *supra* note 7, at 428; *see also id.* at 429 (stress is elevated in early adolescents; incidence of depression is often highest in adolescence; and teens experience sleep problems, great extremes in mood, and peak anxiety and self-consciousness).

make reasoned judgments and stick by them.[12] Even when compared to twelfth graders (rather than adults), seventh and eighth graders show relative deficiencies in imagining risks and future consequences.[13]

Some of an early adolescent's deficits in judgment result from lack of experience, both with life generally and with responsible decision-making. But brain structure at this early developmental stage also

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[12] *See* B. Luna, *The Maturation of Cognitive Control and the Adolescent Brain,* in *From Attention to Goal-Directed Behavior* 249, 252-56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., *Adolescent Decision-Making,* 12 J. Adolescence 265, 267-70 (1989) (13-year-olds show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than 15-year-olds); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning,* 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones).

[13] Catherine C. Lewis, *How Adolescents Approach Decisions,* 52 Child Dev. 538, 543 (1981); *see also* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psychol. 257, 271 (2001) (noting important differences in decision-making competence of early adolescents and older teenagers).

explains teens' inability to make the type of judgments at 13 that they will comfortably handle at 17. Like a car with a powerful accelerator but weak brakes, a young teenager's brain is fully developed in the part responsible for emotional arousal and sensitivity to peer pressure (the gas pedal), but the parts in the frontal lobes that control impulses and allow long-term thinking, planning, and resistance to peer pressure (the brake) are still developing.[14] At 13 and 14, the maior transformation in brain structure that will result in a sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[15]

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[14] *See* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78, 83 (2008) [hereinafter Steinberg, *Social Neuroscience*]; Laurence Steinberg, *Risk-Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Dir. Psychol. Sci. 55, 56-58 (2007) [hereinafter Steinberg, *Risk-Taking*].

[15] *See* Luna, *supra* note 12, at 257; *see also* Thomas J. Whitford et al., *Brain Maturation in Adolescence*, 28 Hum. Brain Mapping 228, 228 (2007) (adolescence is "peak period of neural reorganization"). At the core of this transformation are co-occurring increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci. 77, 77-83 (2004). Myelination increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior – it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed

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facilitated by myelination facilitates cognitive complexity. Geier & Luna, *supra* note 7, at 216; *see also* Giedd, *supra*, at 80 (during myelination transmission time between neurons is increased up to 100 times). White matter in the brain increases in a linear fashion, such that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. Giedd, *supra*, at 80.

Cortical gray matter is thickest early in adolescence. *Id.* at 82. Later in the teenage years, this cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. *Id.*; *see also* Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L.J. 1, 12 (2005); Spear, *supra* note 7, at 439.

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that control executive functioning and process risk do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861, 862 (1999); *see also* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999) (in longitudinal study of brain development, finding prefrontal cortex loses gray matter only at end of adolescence); Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function*, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). These "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into late adolescence." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 Am. Psychologist 1009, 1013 (2003). Indeed, the brain does not appear to finish growing completely until late adolescence. Elizabeth R. Sowell et al., *Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9 NeuroImage 587, 596 (1998); *see also* Halpern-Felsher & Cauffman, *supra* note 13, at

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Young adolescents daily find themselves behind the seat of this fundamentally deficient car without having taken a driver's ed course or even having spent much time in the front passenger seat paying attention to the driver. Their hunger for thrilling speed easily overwhelms their scant capacity to apprehend the possibility of a serious crash; they have weak brakes and very limited visibility ahead or behind. This is why no State permits young adolescents to drive. That older adolescents *are* issued driver's licenses reflects the fact that they are further along in development – they have more experience in making decisions; their brain circuitry is more efficient; the hormonal storm of puberty is not brand-new to them; and they have a better view of their futures.[16] Sixteen- and seventeen-year-olds still are risky, bad drivers compared to adults,[17] but there

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271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence. . . .")

[16] *See supra* notes 12 & 15; Steinberg, *Social Neuroscience*, *supra* note 14, at 86 (sensitivity to effects of pubertal hormones decreases with age).

[17] Recognizing this fact, there is a recent trend to restrict teenage driving. All states but one since 1996 have enacted some sort of graduated licensing law, which "phases in unrestricted driving by allowing beginners to get their initial behind-the-wheel experiences under conditions that reduce the risk of collision." Christine Branche et al., *Graduated Licensing for Teens*, 30 J.L. Med. & Ethics 146, 146-47 (2002) (risk for fatal motor vehicle crashes is "highest for 16-year-olds, who have a more pronounced combination of immaturity and limited driving experience"); Anne T. McCartt et al., Insurance Institute for Highway Safety, *Graduated Licensing Laws and Fatal Crashes*

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is clear consensus that 13-year-olds are so lacking in maturity and decisionmaking capability that they should not even be allowed to take the wheel.

b. Young Adolescents Are Especially Susceptible to Risk-Taking Impulses and Negative Peer Influences.

Early teenagers' incapacity for responsible decisionmaking is closely related to adolescent risk-taking. It is universally recognized that adolescence is characterized by risk-taking behavior; contemporary neurological science establishes that this is a function of physical brain development as well as a socially scripted phase of the passage from childhood to maturity.[18] For the purpose of understanding young adolescent behavior relative to that of older teens, the critical observations are that (1) most adolescent risk-taking is a group phenomenon and (2) young adolescents are the most vulnerable to peer-group influence.

Parents, teachers, and observers of teenagers the world over know that social interactions and

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of Teenage Drivers: A National Study 2-3 (2009), *available at* http://www.iihs.org/research/topics/pdf/r1122.pdf.

[18] *E.g.*, Steinberg, *Risk-Taking*, *supra* note 14, at 56-58; Geier & Luna, *supra* note 7, at 218; Ann E. Kelley et al., *Risk Taking and Novelty Seeking in Adolescence*, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004). The literature documenting adolescents' proclivity for risk-taking is too extensive even to summarize within the compass of this brief.

affiliations with peers take on out-sized importance in adolescence. Teens spend about one-third of normal waking hours talking with peers (but only 8% with adults).[19] While all adolescents are more peer-oriented than adults, the research indicates that vulnerability to peer pressure, especially for boys, increases during early adolescence to an all-time high in eighth grade.[20] The need to fit in with the peer group, to impress peers with daredevil antics and smart-alecky comments, exerts enormous influence on the behavior of young adolescents, more so than during pre-adolescence or late adolescence.[21] Indeed, extreme vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is

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[19] Spear, *supra* note 7, at 420.

[20] Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence,* 57 Child Dev. 841, 848 (1986); *id.* at 846 (autonomy in the face of peer pressure has been shown to decline during early adolescence, "especially for boys, and especially when the pressure is to do something wrong"); *see also* Mann *supra* note 12, at 267-268, 274 (early adolescence associated with greatest conformity to peer group pressure); Steinberg, *Risk-Taking*, *supra* note 14, at 57 (susceptibility to antisocial peer influence peaks in mid-adolescence); N. Dickon Reppucci, *Adolescent Development and Juvenile Justice*, 27 Am. J. Community Psychol. 307, 318 (1999) (social conformity peaks around age 15).

[21] Steinberg, *Social Neuroscience*, *supra* note 14, at 92 (reporting results of study showing that presence of peers activated same brain circuitry that is activated by exposure to reward and led to more risky behavior).

statistically aberrant for boys to refrain from minor criminal behavior during this period.[22]

Most teens grow out of this behavior as a predictable part of the maturation process.[23] Typically, resistance to peer influence and the ability to regulate internal impulses mature in middle or late adolescence.[24] Adolescents' capacity to extricate themselves from a group or other setting where they are likely to get into trouble also increases with age. Denied the rights and privileges that accrue at age 18, all adolescents have less ability than adults to free themselves from morally toxic or dangerous environments. But the youngest teens are, in this aspect as well, worst off. State and federal laws meant to protect young teens from exploitation and from their own underdeveloped sense of responsibility

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[22] Spear, *supra* note 7, at 421; Reppucci, *supra* note 20, at 319.

[23] Spear, *supra* note 7, at 421 (adolescent experimentation in risk-taking is transient for most individuals); Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 L. & Hum. Behav. 219, 229 (2002) (defying rules is part of adolescent experimentation with autonomy and identity development, and many youths who manifest "deviance" in adolescence will not do so in adulthood); Reppucci, *supra* note 20, at 319 ("[D]esistance from antisocial behavior is also a predictable part of the maturation process.").

[24] Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why*, 1021 Annals N.Y. Acad. Sci. 51, 55 (2004) (resistance to peer influence and self-regulation do not mature until middle or late adolescence).

– including restrictions on driving, working, and leaving school – also operate conversely to disable a 13-year-old from escaping an abusive parent, a dysfunctional or violent household, or a dangerous neighborhood.[25]

c. Young Adolescents Have Not Yet Begun to Form Their Own Identities or to Imagine Their Futures.

Young teens, to a greater extent than older teens, are also handicapped by their inability to envision who they want to be or what they want to achieve in the future. They are captive to their peer group's opinion of them – young teens are readily distinguishable even from 15- and 16-year-olds by their excruciatingly low self-esteem and high self-consciousness – and to the instantaneous present.[26]

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[25] This was certainly the situation in which 13-year-old Joe Sullivan found himself. A mentally disabled boy, Joe lived in a household where he was regularly subjected to physical and sexual abuse. J.A. 26.

[26] *See* Nurmi, *supra* note 12, at 12-13; *see also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence*, 20 L. & Hum. Behav. 249, 255 (1996) (moral reasoning and reflectiveness are associated with sense of identity, which does not begin to consolidate until late teens or early twenties; extreme vulnerability in self-image seen especially in younger adolescents); Seagrave & Grisso, *supra* note 23, at 229 ("[M]any adolescents focus excessively on present circumstances and weight the importance of risks differently than do adults, especially when under emotional stress or in situations where a solution is not readily apparent."); Reppucci,

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Not until age 16 do adolescents obtain something close to a mature sense of perspective. And not until the late teens or early twenties do they begin to form a coherent identity – although teens 16 and older have a more mature sense of self than adolescents under 15.[27]

Very few young adolescents think about their future beyond age 30.[28] As adolescents grow older, they become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family; with this added perspective, their ability to plan and to realistically anticipate

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supra note 20, at 318 (adolescents "discount the future more than adults" and "weigh more heavily the short-term versus the long-term consequences of decisions"); Jeffrey Arnett, *Reckless Behavior in Adolescence*, 12 Dev. Rev. 339, 344 (1992) (adolescents' limited life experience impairs ability to fully apprehend possible negative consequences of their actions); Steinberg, *Social Neuroscience*, *supra* note 14, at 90 (feelings of self-consciousness increase during early adolescence, peak around age 15, then decline).

[27] Steinberg, *Social Neuroscience*, *supra* note 14, at 94 (future orientation and planning increase from 16-18); Seagrave & Grisso, *supra* note 23, at 226 (adolescence is time of dramatic changes in identity, during which adolescent may present an "insincere and seemingly choreographed social facade, either by attempting to manage peers' impressions or because they are 'trying on' a not yet established personality style, which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender"); *id.* at 229 (adolescents "focus excessively on present circumstances").

[28] Nurmi, *supra* note 12, at 27.

long-term consequences improves.[29] But at 13 and 14, middle-schoolers tend to struggle with planning even of the order of getting tonight's homework done in time to watch their favorite television program.

The flip side of young adolescents' nascent sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. A typical 13-year-old who acts irresponsibly in reaction to a thrilling impulse or succumbs to peer pressure to do something that would be against his better judgment – had he the wherewithal to form one – is not irretrievably depraved or permanently flawed. Nothing about his character is permanent, and he has years of development ahead, during which he can (and, in most cases, will) grow into a moral, law-abiding adult.[30]

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
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> . . . [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or

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[29] *Id.* at 27-29.

[30] *See supra* note 23.

not they are caught, arrested, prosecuted or sanctioned. . . .[31]

This Court has recognized that adolescents, as a class, lack the maturity, autonomy, and self-governing capacity of adults. *Roper*, 543 U.S. at 569-71; *and see Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982), quoted in 543 U.S. at 569: "Even the normal 16-year-old customarily lacks the maturity of an adult." Within that class, which is defined by the transition from childhood to adulthood, there are gradations in capability that correlate with age. As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[32]

2. The Constitutional Significance of Young Adolescents' Diminished Cognitive Capacity and Psychosocial Immaturity

Roper explains the several ways it is relevant to Eighth Amendment analysis that "the character of a juvenile is not as well formed as that of an adult." 543

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[31] Steinberg, *supra* note 9, at 478.

[32] *See, e.g.*, Laurence Steinberg, Sandra Graham et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 28 (2009) [hereinafter Steinberg, Graham et al., *Future Orientation*]; Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Dev. Psychol. 1531, 1540 (2007); Steinberg, Cauffman et al., *supra* note 8, at 1775-76.

U.S. at 570. Because "[t]he personality traits of juveniles are more transitory, less fixed," *id.*, it is unfair – and in most cases it will prove inaccurate – to pass final judgment on their character. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570.

Most young adolescents will grow out of adolescent criminal behavior, *id.* (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol. 1009, 1014 (2003)), and there are no reliable means for identifying the few who won't:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. *See* Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings,

> rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev.2000); *see also* Steinberg & Scott 1015. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation . . . [, one which will] extinguish his life and his potential to attain a mature understanding of his own humanity.

Roper, 543 U.S. at 573-74.

"[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993), and also quoting Steinberg & Scott at 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.")). Adolescents are capable of rehabilitation, either as a result of natural maturation or through the intervention worked by conviction and sentence. And young adolescents as a class will *necessarily* change over time. To pass a life-without-parole sentence on a young adolescent – a *final* judgment that can never be reconsidered in the fullness of time – is not merely premature but oblivious to "the duty of the

government to respect the dignity of all persons," *id.* at 560.

Roper teaches that the special vulnerabilities and frailties of adolescence bear directly on the Eighth Amendment calculus of personal culpability. Young adolescents' culpability is diminished because they have not yet reached the level of cognitive and psychosocial development that permits adults to make mature decisions, forecast consequences, and control their impulses. The sensation-seeking proclivity and lack of impulse control characteristic of adolescents mean that "their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* at 561 (quoting *Thompson*, 487 U.S. at 835). "[J]uvenile offenders cannot with reliability be classified among the worst offenders" because their "'lack of maturity and an underdeveloped sense of responsibility are . . . more understandable among the young [and] . . . [t]hese qualities often result in impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569 (quoting *Johnson*, 509 U.S. at 367); *see also Atkins*, 536 U.S. at 318 (class-wide deficiencies such as "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" as well as the tendency to "act on impulse rather than pursuant to a premeditated plan" diminish personal culpability).

The characteristic inability of young teens to exercise mature judgment – including generating options and foreseeing consequences – is made worse by their sheer lack of experience with the world (or at least of experience processed through mature cognitive faculties). Even if they possessed the brain circuitry to alter their actions based on a reasoned evaluation of potential consequences and alternative courses, they lack the background knowledge and perspective to assess their immediate circumstances in context. And, juveniles "have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569. This factor explains in part why youth "is a time and condition of life when a person may be most susceptible to influence and to psychological damage," *id.* (quoting *Eddings*, 455 U.S. at 115). It also bears directly on the question of their culpability: "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper*, 543 U.S. at 570.

A young teen's foreshortened future perspective and inability to imagine consequences also undercut the incapacitative and deterrent justifications which might otherwise support an inflexible life-without-parole sentence. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. And "the

same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 571.

B. Hundreds of State and Federal Laws Recognize the Special Vulnerabilities and Deficiencies of Young Adolescents.

Roper does not stand alone in recognizing these special vulnerabilities and their implications for the degrees of responsibility and protection which adolescents should be given – including protection from themselves. *See Roper*, 543 U.S. at 569 (noting that the law generally distinguishes between juveniles and adults, "[i]n recognition of the comparative immaturity and irresponsibility of juveniles"); *see also id.* Appendices B-D (collecting state laws on voting, jury service, and marriage without parental consent); *Eddings*, 455 U.S. at 115-16 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults"). Numerous state and federal laws provide special protections for early adolescents while, at the same time, limiting their freedoms, consistent with the understanding that young teens are not mature enough for a wide range of responsibilities and privileges – from the obvious and universal (driving,[33]

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[33] All States issue at least restricted driver's licenses to 16- or 17-year-olds. No State will issue even a learner's permit to a

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marriage,[34] sex[35]) to the mundane or obscure (fireworks, falconry,[36] tattoos[37]). *See* App. A (collecting state laws differentiating between younger and older adolescents). These ubiquitous regulations manifest the breadth of the consensus that the capacities and vulnerabilities of young adolescents differ substantially from those of adults and even of older teens.

13-year-old, and the vast majority will not issue a learner's permit to a 14-year-old. *See generally* App. A.

[34] Most States do not allow persons under 18 to marry without parental consent. *See Roper*, 543 U.S. 551, App. D. However, most States *do* allow 16- and 17-year-olds, but not younger teens, to marry *with* parental consent. *See generally* App. A.

[35] All States differentiate between younger and older adolescents in regard to consent to sexual activity, with the majority setting the minimum age to give general consent at 16. A minority of States allow 13- or 14- or 15-year-olds to consent to sexual activity with other adolescents, but no State allows a 13-year-old child to consent to sex with an adult. *See generally* Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 44 (1996) (noting that age of consent "range[d] from fourteen to eighteen" but was "either fifteen or sixteen" in "vast majority of states"); *see also* App. A.

[36] *See* App. A.

[37] *See, e.g.*, Idaho Code Ann. § 18-1523 (crime to tattoo child 13 or younger; child 14 to 17 can be tattooed only with parental consent); *see also, e.g.*, Cal. Penal Code § 653 (misdemeanor to tattoo or offer to tattoo child 17 or younger); Wis. Stat. Ann. §§ 948.01, 948.70 (16 or younger may not be tattooed except for medical reasons); S.C. Code Ann. § 44-34-60 (child 17 or younger cannot be tattooed; person 18 to 21 requires parental consent for tattoo; child 17 or younger who is given tattoo can bring action against tattoo artist for actual and punitive damages).

1. State and Federal Law Recognizes That Young Adolescents Are Especially Vulnerable and Provides Heightened Protection from Exploitation and Abuse.

Reflecting the societal judgment that young teens are especially vulnerable to exploitation, abuse, and persuasion, state and federal laws protect them by imposing enhanced criminal liability on older people who victimize them[38] and by obligating adults and older teens to safeguard young adolescents within their sphere of control.[39] Every state and the federal

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[38] *See, e.g.*, Ala. Code § 13A-5-40(a)(15) (murder made capital where victim 13 or younger); Ariz. Rev. Stat. Ann. § 13-751(F)(9) (victim 14 or younger); Ark. Code Ann. § 5-10-101(a)(9) (victim 14 or younger and defendant at least 18); Conn. Gen. Stat. Ann. § 53a-54b(8) (victim 15 or younger); Del. Code Ann. Tit. 11, § 4209(e)(1)(s) (victim 14 or younger and defendant at least 4 years older); 18 Pa. Cons. Stat. Ann. § 2901 (allowing conviction for kidnapping for taking of child under 14 without parental consent, even if child acquiesces); Wash. Rev. Code Ann. § 9A.40.010 (same for child 15 or younger); U.S. Sentencing Guidelines Manual § 2A2.3 ("Minor Assault") (2008) (adding 4 offense levels where victim younger than 16).

[39] *See, e.g.*, Ala. Code § 32-5A-191(n) (enhanced penalties for driving under influence of alcohol with child 13 or younger in vehicle); *id.* § 32-5-222 (operator of vehicle must require passengers 14 and younger to wear seat belts); Ark. Code Ann. § 5-65-111 (enhanced penalties for DUI with child 15 or younger in vehicle); Ariz. Rev. Stat. Ann. § 28-1383(A)(3) (same, 14 or younger); *id.* § 28-909(B) (operator of vehicle must require passenger 15 or younger to wear seat belt); Mo. Ann. Stat. § 307.179(2) (same); Wash. Rev. Code Ann. § 46.61.688(4) (same); *see also, e.g.*, Ariz. Rev. Stat. Ann. § 13-3619 (misdemeanor to endanger life of minor under 16). *See generally* App. A.

jurisdiction accords early adolescents enhanced protection from sex offenses:[40] most States provide that children under 16 are incapable of consenting to sexual activity[41] and, recognizing that young teens are particularly susceptible to negative influences, criminal statutes specifically prohibit the luring or enticing of young teens for the purpose of proposing illicit conduct.[42] The overwhelming majority of States – and this Court – acknowledge that appearing in court traumatizes young adolescents to such a degree that they require shielding from the ordinary demands of the Confrontation Clause when testifying

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[40] *See, e.g.*, Ala. Code § 13A-6-67; Ga. Code Ann. § 16-6-3; 18 U.S.C. § 2241; *see also, e.g.*, Ark. Code Ann. § 5-14-102 (eliminating affirmative defense based on mistake of age where child 14 or younger and defendant 20 or older); Colo. Rev. Stat. § 18-1-503.5 (same, where child 14 or younger); Mo. Ann. Stat. § 566.020 (same, where child 13 or younger).

[41] *See supra* note 35. Many other States set the age of consent at 17, *e.g.*, Mo. Ann. Stat. § 566.034, and even those that set the age of general consent at 18 typically provide stricter protections for children under 16. *Compare, e.g.*, Fla. Stat. Ann. § 800.04 (proscribing various types of sexual contact with children 12-15, without regard to age of defendant), *with id.* § 794.05 (proscribing narrower range of sexual contact with children 16 and 17, unless emancipated, and only where defendant 24 or older).

[42] *See, e.g.*, Ala. Code § 13A-6-69 (crime to lure or entice a child under 16); Ga. Code Ann. § 16-6-5 (same); 720 Ill. Comp. Stat. Ann. 5/10-5.1 (crime to use electronic communications to lure minor under 15); Neb. Rev. Stat. Ann. § 28-311 (crime to solicit, coax, lure or entice child under 14 into vehicle without parental consent); *see also* App. A.

against their abusers. *See Maryland v. Craig*, 497 U.S. 836, 853-54, n.2-4 (1990).[43]

2. State and Federal Law Recognizes That Early Adolescents Are Immature, Impulsive, and Relatively Irresponsible, as Well as That They Are Exceedingly Susceptible to Coercion, by Limiting Their Rights and Responsibilities in Many Aspects of Life.

The law seeks to protect young adolescents from exploitation and from their own lack of judgment in diverse contexts: education, employment, economic transactions, and so forth. Thirteen- and fourteen-year-olds universally are deemed too immature and irresponsible to drive, vote, serve on juries, drink alcohol, gamble, or marry even with parental consent. *See* App. A. All States require children under 16 to attend school.[44] In contrast to older teens, all States and the federal government limit the type and amount of work young teens can do[45] and most

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[43] *See, e.g.*, Ala. Code §§ 15-25-2, 15-25-3 (allowing alternate procedures where victim 15 or younger); Ariz. Rev. Stat. Ann. § 13-4251 (same, victim 14 or younger); Mo. Ann. Stat. § 491.075 (13 or younger); *see generally* App. A.

[44] *See generally* Mark G. Yudof et al., *Education Policy and the Law* 1 (4th ed. 2002).

[45] *See, e.g.*, Mo. Ann. Stat. §§ 294.011, 294.021, 294.030 (forbidding most employment of children under 14 and limiting employment of 14 and 15 year olds); 43 Pa. Cons. Stat. Ann. §§ 42, 44 (limiting employment of 14- and 15-year-olds more

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jurisdictions have adjudged early adolescents incapable of entering into contracts.[46]

Although jurisdictions draw lines for these protective and restrictive provisions at various points in early- to mid-adolescence, they universally bar 13-year-olds from activities that require maturity and responsible judgment. *See* App. A. That these activities are permitted for many late adolescents demonstrates society's widespread recognition that early adolescents are developmentally distinct from adults and older teens, that 13-year-olds specifically lack the developmental capacity to bear such responsibilities, but that their incapacity will abate over the course of adolescence.

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strictly than 16- and 17-year-olds); 29 U.S.C. §§ 203(l), 212, 213(c) (regulating child labor and distinguishing between teens younger than 16 and teens 16 or 17 years old). *See generally* App. A.

[46] *See, e.g.*, Ala. Code § 27-14-5 (minors 15 and older can contract for certain kinds of insurance); Ariz. Rev. Stat. Ann. § 20-1106 (same); Colo. Rev. Stat. § 10-4-104 (same, 16 and older); Mich. Comp. Laws § 500.2205 (same); N.Y. Educ. Law § 281 (children 16 and older cannot disaffirm education loans).

C. The Distinctive Characteristics of Young Adolescents Recognized in State, Federal, and Constitutional Law Undermine the Legitimacy and Utility of Life-Without-Parole Sentences for Young Teens.

Precisely the same reasoning that dictated this Court's decision in *Roper* compels the conclusion that a sentence of life imprisonment without parole for a 13-year-old child violates the Eighth Amendment. As we have seen, *Roper*'s analysis centers on the disjunction between a punishment that declares an offender finally and forever unfit to exist in society and the uniquely transitory characteristics of youth that preclude any such declaration. *Roper* identifies those characteristics, the kinds of scientific and legal sources from which additional information about them can be obtained, and the ways in which that information bears upon the Eighth Amendment's guiding principles. When *Roper*'s constitutional methodology is applied to the signature characteristics of young adolescents – spelled out in the preceding pages of this brief – a firm basis emerges for the finding that a child of 13 cannot legitimately be consigned to lifelong incarceration with no possibility of ever being considered fit for release on parole.

1. Some of These Characteristics Bear Directly on the Degree of Culpability That Is Appropriate to Attach to Adolescent Criminal Behavior.

Children of 13 and even 14 are especially vulnerable to each of the frailties and limitations that *Roper* regarded as relevant to a youthful offender's degree of culpability. They are neurologically and emotionally hard-wired for sensation-seeking, impulsivity, poor foresight, worse judgment, and control failure. They are uniquely sensitive to peer pressure and bad external influences. They did not and cannot choose the conditions of upbringing that make them what they are, and the very protective laws that recognize their incapacities have the correlative effect of limiting their ability to escape from those conditions. Their existence is dominated by the "struggle to define their identity" (*Roper*, 543 U.S. at 570) which they are not yet equipped to win. Even for older teens, "the case for retribution is not as strong with a minor as with an adult." *Id.* at 571. And it is still more true of younger teens that their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.*

2. Some of These Characteristics Bear on the Inutility of Life Without Parole as a Deterrent.

Roper explained that the "same characteristics that render juveniles less culpable than adults

suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 571. Because "adolescents are less oriented to the future than are adults,"[47] far-future consequences are less meaningful to them, and it is difficult to imagine them planning their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Moreover, testing of individuals between 10 and 30 years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals."[48]

3. Some of These Characteristics Bear on the Risks of Wrongful Conviction (Or Degree of Conviction) and on the Even More Serious Risks of Erroneous Judgment Regarding Appropriate Sentence.

Roper observes that "[i]t is difficult even for expert psychologists to differentiate between . . . [corrigible and incorrigible] juvenile offender[s]." *Roper*, 543 U.S. at 573. We have argued above that this difficulty is one of the considerations that make life-without-parole sentences inherently unsuitable for young adolescents. It also means that if such

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[47] Steinberg, Graham et al., *Future Orientation*, *supra* note 32, at 39.

[48] *Id.* at 36.

sentences are permitted, there is a significant risk that they will be imposed on the wrong adolescents.

This danger is greater in the case of young adolescents because this age group as a whole is cognitively and psychosocially impaired in ways that undermine the fairness and reliability of criminal proceedings against them. These impairments not only enhance the risk of erroneous sentencing decisions; they also enhance the risk of erroneous convictions. Thirteen-year-old children, like mentally retarded adults, are at relatively high risk because they are "less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); *see also Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008) (noting as a "serious systemic concern[]" the unreliability of child witnesses).

In adult criminal proceedings, critical decisions – such as whether to accept a plea agreement, waive a jury trial, or testify – must be made by the defendant. *See* ABA Model Rules of Professional Conduct, Rule 1.2(a). The scientific and sociological evidence raises doubts about the capacity of a significant number of 13-year-olds to make these decisions.[49] And

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[49] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 L. & Hum. Behav. 333, 356 (2003) (finding that one of every three 11- to 13-year-olds and one of every five 14- to 15-year-olds showed impairments in competency that would

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unsurprisingly, young adolescents are particularly susceptible to giving false confessions. Of young adolescents who have been exonerated in the United States, 69% had confessed falsely, as compared to 25% of older teens and 8% of adults.[50] Because young adolescents more readily perceive short-term benefits than hard-to-imagine future outcomes, they tend to give inculpatory statements in order to be allowed to go home.[51] Young adolescents rarely question information provided to them by adults and are quick to comply with the wishes of authority figures, making them highly susceptible to police suggestions and pressure.[52]

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result in mentally ill adult being found incompetent to stand trial); *id.* at 357 (young adolescents cannot recognize risks or consider long-term consequences of legal decisions); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 11 (1997) (noting that over half of adolescents studied thought judges would penalize defendants for exercising rights).

[50] *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (table 4) (2005); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004); Allison S. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 148 (2003).

[51] *See* Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 Law & Psychol. Rev. 53, 65-66 (2007).

[52] *See* Redlich & Goodman, *supra* note 50, at 150-52.

4. The Severe, Terminal Sanction of Life Without Parole Is Inappropriate for Young Adolescents Because the Retributive, Deterrent, and Incapacitative Virtues of Such a Punishment Are Attenuated in Their Cases.

"[L]ife without parole for a juvenile, like death, is a sentence different in quality and character from a sentence to a term of years subject to parole." *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984). Life without parole was enacted "to deal with dangerous and incorrigible individuals who would be a constant threat to society." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).[53] There is no sound basis for finding incorrigibility in the case of an as-yet-undeveloped young teen. *Id.* Plainly put, "incorrigibility is inconsistent with youth." *Id.*[54]

The California Court of Appeal recently held in *In re Nunez*, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009),

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[53] Life without parole may be an appropriate sentence for an aggravated non-homicide offense committed by an adult. *See Harmelin v. Michigan*, 501 U.S. 957 (1991); *but see Solem v. Helm*, 463 U.S. 277 (1983).

[54] Life without parole is not necessary to serve the penological goal of incapacitation. Life *with* possibility of parole would permit review and evaluation of an offender, as an adult, to determine whether dangerousness or incorrigibility should preclude his or her release – a determination that cannot reliably or accurately be made at sentencing, when a child's character has not formed. The availability of parole can identify those members of the small subset of juvenile offenders who do not grow out of criminal behavior and should remain incarcerated.

that a life-without-parole sentence imposed for a kidnapping offense at age 14 "amounts to a penalty so arbitrary that it constitutes cruel and unusual punishment" and violates the Eighth Amendment. *Id.* at 265. The court reasoned that a sentence to life without parole "is the harshest the state may impose on teenage offenders almost four years older than . . . [fourteen] (*Roper, supra*)." *Id.* at 263. Nunez's age was considered constitutionally "relevant because the harshness of the penalty must be evaluated in relation to the particular characteristics of the offender." *Id.*

When imposed on a 13-year-old child, a life-without-parole sentence is a "denial of hope" because "it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the defendant], he will remain in prison for the rest of his days." *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989). It "extinguish[es] his life and his potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 574.

D. Objective Indicia Demonstrate That There Is a Consensus Against Imposing Sentences of Life Imprisonment Without Parole upon Young Adolescents.

In gauging the acceptance or rejection of a particular criminal punishment by contemporary society, the Court looks to both legislative enactments and the actual sentencing practices of judges and jurors. *Roper*, 543 U.S. at 564-67. "Part of the

rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance." *Thompson*, 487 U.S. at 822 n.7 (plurality opinion).

Thompson relied in part on a finding that juries had imposed the death penalty on offenders under 16 with exceeding rarity; no adolescent offenders below that age had been executed in the preceding 40 years. 487 U.S. at 832-33. Subsequently, "*Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent"; from 1989 to 2002, "only five States had executed offenders known to have an IQ under 70." *Roper*, 543 U.S. at 564. On the basis of these indicia, this Court determined that executing mentally retarded offenders "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Atkins*, 536 U.S. at 316. And *Roper* based its finding of "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal'" (*Roper*, 543 U.S. at 567) partly on the observations that "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. . . . [In the past 16 years], six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so." *Id.* at 564-65.

The touchstone of actual use makes particularly good sense in the context of life-without-parole

sentences for young adolescents because the statutory authorization for these sentences are largely the result of the unplanned interplay of two independent legislative developments: (i) the expansion of life-without-parole sentences for adult crimes; and (ii) modifications of juvenile-court jurisdiction that bring a larger number of adolescents into adult court. These developments cannot be read as expressing any legislative judgment on the appropriateness of life without parole for adolescents specifically.

1. Life Without Parole for Young Adolescents Is an Unconsidered Consequence of Two Distinct Legislative Developments.

In the last few decades, politically popular "tough on crime" policies like "truth in sentencing" have greatly circumscribed parole, resulting in a dramatic increase in the availability of life-without-parole sentences *for adults*.[55] Florida abolished parole for all non-capital offenses in 1983. 1983 Fla. Laws, ch. 87, § 2 (initially codified at Fla. Stat. § 921.001(8)).[56]

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[55] *See* Marc Mauer et al., *The Meaning of "Life": Long Prison Sentences in Context* 1, 5-8, 12 (2004), *available at* http://sentencingproject.org/Admin/Documents/publications/inc_meaningoflife.pdf.

[56] In 1995, the statute was expanded to include capital offenses. 1995 Fla. Laws, ch. 294, § 4 (eff. Oct. 1, 1995) (now codified at Fla. Stat. Ann. § 775.082(1)). Prior to that time, it had the bizarre result of making offenders sentenced to life

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Simultaneously with the trend to increase penalties for adult offenders by expanding the availability of life-without-parole sentences, States responded to concerns about the perceived inadequacy of the juvenile justice system to deal with violent youth crime by lowering the age at which children could be prosecuted in adult court.[57] This change in inter-court jurisdictional boundaries or in transfer provisions reflected fears that detention in a juvenile facility until age 18 or 21 would be insufficient to address a falsely-prophesied wave of "super-predators."[58] But there is no evidence of any

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imprisonment for capital murder parole-eligible while lesser offenders were condemned to die in prison without the possibility of parole.

[57] *See* Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, *Juvenile Justice: A Century of Change* 4-5 (1999), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf.

[58] *See, e.g.*, Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime?*, 37 San Diego L. Rev. 783-86, 792 (2000) (observing general frustration resulting from belief that powers of juvenile courts were inadequate to punish, deter, and incapacitate juveniles convicted of high-profile violent crimes). "Super-predator" language was commonly used in conjunction with dire predictions that a vast increase in violent juvenile crime was occurring or about to occur. *See, e.g.*, Sacha Coupet, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. Pa. L. Rev. 1303, 1307 (2000); Laura A. Bazelon, *Note: Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. Rev. 159 (2000). The predictions proved wildly inaccurate. Lower rates of juvenile

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significant legislative consideration of the specific question whether a permanent punishment like lifelong imprisonment without parole is appropriate for young adolescents. For the most part, life-without-parole sentencing for young adolescents became technically possible in many jurisdictions as an adventitious consequence of the overlay of two distinct movements, neither directed to the question.

Thompson teaches that a legislative judgment about the appropriate penalty for a child offender cannot be inferred from a statute that simply regulates the boundary between juvenile-court and adult-court jurisdictions.[59] The wisdom of this teaching is illustrated by the fact that, when Florida

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crime from 1994 to 2000 despite simultaneous increases in the juvenile population led many academics who had originally supported the "super-predator" theory to back away from their predictions; it also led the Surgeon General of the United States to release a report in 2001 stating that there was no evidence that the young people involved in crime during the early 1990's were more frequent or more vicious offenders than youth in previous years. David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641, 642-43 (2002).

[59] 487 U.S. at 829 n.24 (plurality opinion) (that some States had "set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders*" [emphasis in original]); *accord id.* at 850-51 (O'Connor, J., concurring).

adopted legislation requiring direct indictment in adult criminal court of a child of any age charged with a crime "punishable by death or life imprisonment," Fla. Stat. Ann. § 985.56(1), the State had not yet enacted a life-without-parole statute. 1969 Fla. Laws, ch. 146, § 1 (initially codified at Fla. Stat. § 39.02, now codified at Fla. Stat. Ann. § 985.56). Its legislation exposing some children (of any age) to adult-court prosecution clearly cannot be read as contemplating life-without-parole sentences for those children.

2. No State That Has Expressly Addressed the Question of the Minimum Age of Eligibility for a Life-Without-Parole Sentence Has Set the Age as Low as 13.

Where States have expressly addressed the minimum age at which life imprisonment without parole may be imposed, they almost universally have set that age above 13 or 14. *See, e.g.*, La. Child. Code Ann. art. 857(B) ("[n]otwithstanding any other provision of law to the contrary, a fourteen-year-old who is transferred pursuant to this Article and subsequently convicted shall not be confined for such conviction beyond his thirty-first birthday"); Colo. Rev. Stat. § 17-22.5-104(2)(d)(IV) (minimum age for life without parole is 18); Cal. Penal Code § 190.5 (minimum age for life without parole for first-degree

murder is 16)[60]; Ind. Code § 35-50-2-3 (minimum age for life without parole for murder is 16); D.C. Code § 22-2104 (minimum age for life without parole for murder is 18); Kan. Stat. § 21-4622 (minimum age for life without parole for capital murder is 18); Ky. Rev. Stat. § 640.040 (minimum age for life without parole for murder is 18); Or. Rev. Stat. § 61.620 (prohibiting imposition of life-without-parole sentence on any child under 18); Tex. Penal Code § 12.31(a)(1), amended by 2009 Tex. Sess. Law Serv. 765 (S.B. 839, approved June 19, 2009, eff. Sept. 1, 2009) (minimum age for life without parole is 18). The outlier, Massachusetts, sets the minimum age at 14 (for life without parole for murder). Mass. Gen. Laws ch. 119, § 72B.[61]

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[60] The California Court of Appeal recently struck down the code provision that permitted a juvenile kidnapper under age 16 to be sentenced to life without parole, Cal. Penal Code § 209(a), as violative of the United States and California Constitutions. *In re Nunez*, 93 Cal. Rptr. 3d 242, 258 (Cal. Ct. App. 2009) (finding "state's sentencing scheme makes a perverse distinction between juvenile offenders under 16 years old, providing for harsher punishment for those who do not harm a victim kidnapped for ransom than for those who commit murder with special circumstances" and thus "shocks the conscience and violates human dignity").

[61] Some death-penalty States explicitly abolished the death penalty for juveniles by provisions that arguably authorize life without parole. *See, e.g.*, 730 Ill. Comp. Stat. Ann. 5/5-8-1; Md. Code Ann., Crim. Law § 2-202(b)(2); Nev. Rev. Stat. Ann. § 176.025 (maximum sentence for person under 18 is "life," which could be with or without parole); N.J. Stat. Ann. § 2C:11-3(b); N.C. Gen. Stat. Ann. § 14-17; Ohio Rev. Code Ann. § 2929.03(E) (provides

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The complete absence of legislative enactments expressly approving life imprisonment without parole for 13-year-olds – and the near-complete absence of express legislative approval of such a sentence even for 14-year-olds – reflects a consensus that the sentence would be excessively harsh punishment as applied to a young adolescent.

3. In Actual Practice, the Imposition of a Life-Without-Parole Sentence on a Young Teenager Is an Aberrant, Vanishingly Rare Occurrence.

Although not explicitly addressing the issue of the propriety of life-without-parole sentences for the youngest teens, statutes in 27 States have the effect of exposing 13-year-olds to such a sentence,[62] and

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for life with or without parole); Va. Code Ann. § 18.2-10(a); *cf.* Mo. Stat. Ann. § 565.020 (amended 1990) (amending Missouri's death-penalty statute to comply with *Thompson* by eliminating the death penalty and substituting life without parole for children under 16).

[62] Del. Code Ann. tit. 10, § 1010, *id.* tit. 11, § 4209; Fla. Stat. Ann. §§ 775.082, 985.557, 985.56(1); Ga. Code Ann. §§ 16-3-1, 16-5-1(d), 15-11-28(b); Haw. Rev. Stat. Ann. §§ 571-22, 706-656(1); Idaho Code Ann. §§ 18-4004, 20-509(1); 705 Ill. Comp. Stat. Ann. 405/5-130, 730 Ill. Comp. Stat. Ann. 5/5-8-1(a)(1); Me. Rev. Stat. Ann. tit. 15, § 3101; *id.* tit. 17-A, § 1251; Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06, *id.* Crim. Law §§ 2-201, 2-202, 2-203, 2-304; Mich. Comp. Laws §§ 712A.2d, 750.316, 791.234(6)(a); Miss. Code Ann. §§ 43-21-151(3), 43-21-157, 97-3-21; Mo. Ann. Stat. §§ 211.071, 565.020; Mont. Code Ann. §§ 41-5-206(1), 45-5-102; Neb. Rev. Stat. Ann. §§ 28-105, 28-303, 43-247; Nev. Rev. Stat. Ann. §§ 62B.330, 94.010, 200.030; N.H. Rev. Stat. Ann.

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statutes in an additional 13 States make the sentence possible for 14-year-olds.[63] In the light of this broad theoretical availability, the infrequency with which 13-year-olds – or even 14-year-olds – are actually sentenced to life without parole is striking. It evidences nationwide repudiation, not acceptance, of the sentence for children of these young ages.

There are only nine persons in the United States under life-without-parole sentences for offenses committed at age 13, and only 64 more serving life without parole for offenses at 14.[64] These numbers are

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§§ 169-B:24, 628:1, 630:1-a; N.C. Gen. Stat. Ann. §§ 7B-2200, 14-17; Okla. Stat. Ann. tit. 10, § 7306-1.1; *id.* tit. 21, § 701.9; 42 Pa. Cons. Stat. Ann. §§ 1102, 6302, 6355, 9711; R.I. Gen. Laws, §§ 11-23-2, 14-1-7; S.C. Code Ann. §§ 16-3-20, 63-19-1210(6); S.D. Codified Laws §§ 22-6-1, 22-16-12, 26-11-4; Tenn. Code Ann. §§ 37-1-134, 39-13-202, 39-13-204; Vt. Stat. Ann. tit. 33, §§ 5102(2)(C), 5204; *id.* tit. 13, § 2303; Wash. Rev. Code Ann. §§ 10.95.030, 13.40.110; W. Va. Code Ann. §§ 49-5-10, 61-2-2, 62-3-15; Wis. Stat. Ann. §§ 938.18, 938.183, 940.01, 939.50(3)(a); Wyo. Stat. Ann. §§ 6-2-101, 14-6-203, 14-6-237.

[63] Ala. Code §§ 12-15-203, 13A-5-39(1); Ariz. Rev. Stat. Ann. §§ 13-501(B), 13-752(A); Ark. Code Ann. §§ 5-4-104(b), 9-27-318; Conn. Gen. Stat. Ann. § 46b-127 (amended in nonpertinent part eff. Jan. 1, 2010), 53a-35a, 53a-54a; Iowa Code §§ 232.45(6)(a), 902.1; Mass. Gen. Laws ch. 119, § 74, *id.* ch. 265, § 2; Minn. Stat. Ann. §§ 260B.125, 609.106; N.J. Stat. Ann. §§ 2A:4A-26, 2C:11-3; N.M. Stat. Ann. §§ 31-18-14 (as amended by 2009 N.M. Laws, ch. 11, § 1), 32A-2-3, 32A-2-20; N.D. Cent. Code §§ 12.1-04-01, 12.1-16-01, 12.1-32-01; Ohio Rev. Code Ann. §§ 2152.10, 2929.03; Utah Code Ann. §§ 76-2-301, 76-3-206, 78A-6-602(3); Va. Code Ann. §§ 16.1-269.1, 18.2-10.

[64] J.A. 27; Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20

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especially indicative of nationwide repudiation when one considers that 9 and 73 represent the total *accumulations* of life-without-parole sentences imposed on 13- and 14-year-olds over the last 30 years or so. (Young inmates serving life without parole do not, of course, routinely cycle out of the data base until claimed by death.) During the same time period, no less than a quarter million adolescents under age 15 have been arrested for crimes for which a life-without-parole sentence could have been imposed.[65]

(2007) [hereinafter *Cruel and Unusual*] (reporting results of nationwide study identifying 73 children nationwide serving life-without-parole sentences for offenses at age 13 or 14). No one in the country is serving life without parole for an offense committed below the age of 13. The actual practice of sentencing young adolescents to life without parole is even more rare for offenses not involving a killing: only two people in the country are sentenced to life without parole for a non-homicide at age 13 (including Joe Sullivan), and only three additional people are serving life without parole for a non-homicide at 14. All five of these sentences were imposed in the State of Florida. *Id.* at 24 (reporting seven such sentences, of which one has been vacated, *In re Nunez*, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009) (14-year-old), and one is life *with* parole, *State v. Green*, 502 S.E.2d 819, 822 (N.C. 1998); N.C. Gen. Stat. Ann. § 15A-1371(a1) (West 1988)).

[65] Between 1978 and 2007, according to the federal government's Uniform Crime Reports, 290,188 children 14 and younger were arrested for murder or nonnegligent manslaughter, rape, or robbery. *See* U.S. Dep't of Justice, Fed. Bureau of Investigation, *Uniform Crime Reports for the United States*, Table 38 (2007), http://www.fbi.gov/ucr/cius2007/arrests/; *id.* (2006), http://www.fbi.gov/ucr/cius2006/arrests/; *id.* (2005), http://www.fbi.gov/ucr/05cius/arrests/; *id.* at 290 (2004), *available at* http://www.fbi.gov/ucr/ucr.htm; *id.* at 280 (2003); *id.* at

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The numbers 9 and 73 bear comparison with the parallel figures for the classes involved in *Roper* and *Atkins*. When *Roper* recognized a national consensus against death sentences for juveniles, 72 juvenile offenders were under that sentence.[66] When *Atkins* found a national consensus against death sentences for persons with mental retardation, it was estimated that one to three percent of the death-row population – roughly 71 people – were mentally retarded.[67]

The overwhelming majority of jurisdictions in this country – 44 States, the District of Columbia, and the federal government – have not sentenced a single child as young as 13 to life imprisonment without parole. Indeed, the vast majority of jurisdictions nationwide – 32 States, D.C., and the

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244 (2002); *id.* (2001); *id.* at 226 (2000); *id.* at 222 (1999); *id.* at 220 (1998); *id.* at 232 (1997); *id.* at 224 (1996); *id.* at 218 (1995); *id.* at 227 (1994); *id.* (1993); *id.* (1992); *id.* at 223 (1991); *id.* at 184 (1990); *id.* at 182 (1989); *id.* at 178 (1988); *id.* at 174 (1987); *id.* (1986); *id.* (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); *id.* at 171 (1981); *id.* at 200 (1980); *id.* at 196 (1979); *id.* at 194 (1978).

[66] Victor L. Streib, *Death Sentences and Executions for Juvenile Crimes, January 1, 1973-September 30, 2004* 3 (2004), *available at* http://www.demaction.org/dia/organizations/ncadp/Affiliate/Toolkit/Resources/DeathPenalty/JuvDeathSept302004.pdf.

[67] *See Atkins*, 536 U.S. at 309 n.5; Death Penalty Information Center, *Size of Death Row By Year*, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (last visited July 14, 2009) (showing 3557 death row inmates in 2002).

federal government – have not sentenced a single child of either 13 or 14 to life imprisonment without parole. Only six States have 13-year-old offenders serving life-without-parole sentences,[68] and only 12 additional States have 14-year-olds serving such sentences.[69] Most of the 18 States nationwide that have imposed life-without-parole sentences on young adolescents have done so rarely; only six States have more than two or three children serving such sentences.[70] Most of the sentences are for murder.

Another measure of the level and nature of public toleration of these sentences is the race of the people who get them. All but one of the 13-year-olds sentenced to life imprisonment without parole in this

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[68] J.A. 27; *Cruel and Unusual*, *supra* note 64, at 20 (Florida, Illinois, Nebraska, North Carolina, Pennsylvania, and Washington). Since publication, reported cases show that the offender in Illinois was 14, not 13, at the time of the offense, which eliminates Illinois from this cohort. *See People v. Davis*, 904 N.E.2d 149, 151 (Ill. App. Ct. 2009). However, Mississippi takes its place. *See Banyard v. State*, No. 2006-KA-01843-COA, 2009 WL 596013 (Miss. Ct. App. Mar. 10, 2009).

[69] *Cruel and Unusual*, *supra* note 64, at 20 (14 or younger serving life without parole in 19 states: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Illinois, Iowa, Michigan, Missouri, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin). The current number is 18 states because California has no people serving life without parole for offenses committed at 14 or younger. *See In re Nunez*, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009) (reversing unconstitutional life-without-parole sentence for aggravated kidnapping at 14).

[70] *Cruel and Unusual*, *supra* note 64, at 20.

country are Black or Latino.[71] All of the 13- and 14-year-olds serving that sentence for non-homicide offenses are African American.[72] Of the 73 people nationwide serving life-without-parole sentences for offenses committed at ages 13 or 14, 70% are racial minorities.[73]

Most of these sentences were imposed during the height of the racially charged "super-predator" mythology that fueled public fears about youth crime.[74] In the last decade, those predictions proved false, the fearful theorists have been discredited,[75] and the rate of sentencing middle-schoolers to life imprisonment with no chance of release has declined dramatically. No 13-year-old has been sentenced to

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[71] *Id.* at 21.

[72] *Id.*

[73] *Id.*

[74] *See supra* note 58. Illustrative of the racial coding of the mythology is John J. DiIulio, *My Black Crime Problem, and Ours*, City Journal (1996), *available at* http://www.city-journal.org/html/6_2_my_black.html (warning about "270,000 more young predators on the streets than in 1990, coming at us in waves over the next two decades . . . as many as half of these juvenile super-predators could be young black males"); *see also, e.g.*, William J. Bennett, John J. DiIulio, Jr., & John P. Walters, *Body Count: Moral Poverty – And How to Win America's War Against Crime and Drugs* 27-28 (1996).

[75] *See* Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L. Rev. 727, 728 (1998) (analyzing juvenile crime statistics and concluding "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s").

life without parole for a non-homicide offense in 18 years; only two 13-year-olds have been given such sentences for any offense in the past decade. The broad social context for and "the consistency of the direction of change," *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315), support a finding that standards of decency have now evolved to the point that they clearly repudiate the imposition of a permanent, hopeless sentence on inherently changeable, still-developing young adolescents – particularly where the practice disproportionately condemns children of color.

The determination that life imprisonment with no possibility of parole is an excessive punishment for adolescent offenders "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction" to this punishment. *Roper*, 543 U.S. at 575. The United States stands alone in sentencing children to die in prison without hope of ever winning release; no other country is known to have any offenders serving life-without-parole sentences for crimes as children.[76] Sentencing juveniles to life without parole is banned by international conventions signed by almost every member of the world community of nations. The Convention on the Rights of the Child, ratified by every country in the world except the United States

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[76] *See* Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 990 (2008).

and Somalia, expressly forbids sentencing juveniles to spend the rest of their lives in prison,[77] and the United States was alone in opposing a resolution in the United Nations General Assembly calling on all states to abolish life sentences without parole for juveniles. The motion passed by a vote of 176 to 1.[78] The United States has been found to be in potential violation of two treaties to which it *is* a signatory, the International Covenant on Civil and Political Rights and the Convention Against Torture, Inhumane or Degrading Treatment or Punishment, due to its imposition of life imprisonment without parole on children.[79]

When the actual practice of imposing life-without-parole sentences on young adolescents is examined, it amounts to a powerful demonstration of domestic and global unacceptability. Most jurisdictions in this Nation have had a chance to use life without parole extensively in the sentencing of adolescents but have "voted with their feet" against

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[77] U.N. Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-70 (entered into force Sept. 2, 1990).

[78] G.A. Res. 61/146, ¶ 31(a), UN Doc. No. A/Res/61/146 (Dec. 19, 2006).

[79] *See* U.N. Human Rights Committee, 87th Sess., Concluding Observations on the United States of America, ¶ 34, U.N. Doc. CCCPR/C/SR.2395 (Dec. 18, 2006); U.N. Committee Against Torture, 36th Sess., Conclusions and Recommendations on the United States of America, ¶ 34, U.N. Doc. No. CAT/C/USA/CO/2 (July 25, 2006).

this form of punishment. It is shunned world-wide. What emerges is a solid consensus that the passing of irrevocable judgment on a child of 13, condemning him or her to be imprisoned until death, is an intolerable aberration.

E. Appropriate Categorical Lines Can Readily Be Drawn.

Roper recognized that a categorical preclusion of death sentences for juveniles was constitutionally necessary, and the same necessity exists, for even greater reason, in the case of life-without-parole sentences for young adolescents. Reliance on individualized sentencing or a case-by-case approach is still less feasible in this context than in the context of capital sentencing, because a substantial percentage of adolescents' life-without-parole sentences were dictated by mandatory-minimum-sentencing provisions that permit no consideration of the individual adolescent's character, life history, and circumstances. In the remaining cases, where judges do have discretion to impose a sentence less than life without parole, the same "unacceptable likelihood [that was found in *Roper*] exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" should require the lesser sentence. *Roper*, 543 U.S. at 573. If the crime seems inexplicable for a child of the defendant's age, "a defendant's youth may

even be counted against him." *Id.* And as discussed above, *supra* at pp. 38-40, the same developmental deficits of young adolescents that diminish their personal culpability also impair their ability to participate effectively in the adult criminal-trial and criminal-sentencing processes and to defend themselves against the harshest result at sentencing. Because the "differences between juvenile and adult offenders are too marked and well understood" to risk allowing a 13-year-old offender to be sentenced to life in prison without the possibility of parole "despite insufficient culpability," *id.* at 572-73, a categorical rule barring the infliction of a life-without-parole sentence on any offender under a certain age is necessary.

The question, then, is not whether to draw a category boundary but only where to draw it. This is, of course, familiar territory for the Court. *See Roper*, 543 U.S. at 574 (despite "the objections always raised against categorical rules . . . , a line must be drawn"); *Thompson*, 487 U.S. at 828 (plurality opinion) (finding it "self-evident" that the Constitution would not permit the execution of a 10-year-old child and acknowledging the consequent necessity of drawing some categorical line in terms of age); *accord id.* at 848 (O'Connor, J., concurring). The accepted process of locating the line through a consideration of "objective indicia of consensus" (*Roper*, 543 U.S. at 567) and the exercise of "the Court's independent judgment" (*id.* at 563) is fully adequate to the task.

The Court could discern a satisfactory basis for drawing the line at any one of several different ages. To a considerable extent, the vulnerabilities and limitations of adolescence are common to a 13-year-old like Joe Sullivan and to a 16-year-old like Terrance Graham in *Graham v. Florida*, No. 08-7412. For that reason, and because of the widespread recognition that full adult responsibilities requiring maturity of judgment should be withheld from adolescents below the age of 18 (*see* Appendices B-D to the *Roper* opinion), the line could properly be drawn at 18.

However, as the scientific data we have summarized at pp. 12-25 *supra* and the common-sense observations of parents the world over attest, 13- and 14-year-olds as a class are *much* less mature than 17-year-olds.[80] And numerous state statutes

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[80] *See, e.g.*, Steinberg, Graham et al., *Future Orientation*, *supra* note 32, at 39 (reporting "significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals"); Steinberg & Monahan, *supra* note 32, at 1538-41 (documenting that "resistance to peer influence increases linearly over the course of adolescence, especially between ages 14 and 18. In contrast, there is little evidence of growth in this capacity between 10 and 14 or between 18 and 30." [*id.* at 1538]); Steinberg, Cauffman et al., *supra* note 8, at 1776 ("The first half of the adolescent decade – between 10 and 15 – appears to be a time of growing vulnerability to risky behavior, as this period is characterized by relatively higher sensation seeking in the context of relatively lower impulse control; heightened sensation seeking impels adolescent toward risky activity, and immature self-regulatory capabilities do not restrain this impulse. . . . [V]ulnerability

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recognize this plain fact of life by providing special protections for children of 13 and 14 and by restricting their freedoms in ways that are thought unnecessary in the case of older teenagers. *See* pp. 30-35 *supra* and Appendix A *infra*. An additional – indeed, independently sufficient – basis for drawing the line between 14 and 15 would be the indisputable numerical evidence of repudiation of sentences of life imprisonment without the possibility of parole for 13- and 14-year-olds: a nationwide total of only 73 such sentences having been imposed in a quarter of a million cases where they could have been. *See* pp. 49-53 *supra*. While we do not have access to precise data regarding the comparable figure for older adolescents, the available indications are that the numbers rise sharply from age 15 upwards.[81]

There is also justification for drawing the line between 15 and 16. Many state statutes group 15-year-olds with 13- and 14-year-olds for purposes of the special protections and restrictions that they prescribe for younger teens but not older ones. And in the ordinary course of adolescent development, the

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toward risky behavior would be expected to decline from age 15 on, since both sensation seeking and impulsivity diminish linearly after this age.").

[81] As of 2008, Human Rights Watch estimates there are 2484 offenders serving juvenile life-without-parole sentences in the United States. Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008* (2008), *available at* http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf.

growth of some capabilities that are crucial for mature judgment appears to level off at 16. *See, e.g.*, Laurence Steinberg, Elizabeth Cauffman et al., *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psychol. 1764, 1771 (2008) ("sensation seeking increases during the first half of adolescence and then declines steadily from age 16 on"); *id.* at 1174 ("heightened sensation seeking is most clearly and consistently seen among individuals between the ages of 12 and 15"); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clin. Psychol. 459, 467 (2009).

But wherever the line is drawn, there is no defensible constitutional logic consistent with *Roper* and with the basic Eighth Amendment command of respect for every individual's "potential to attain a mature understanding of his own humanity" (*Roper*, 543 U.S. at 574), that allows a State to condemn a 13-year-old child to die in prison with no opportunity ever to demonstrate that he has grown into an adult human being who is fit to live in human society.

CONCLUSION

The judgment below should be reversed and Joe Sullivan's sentence of life imprisonment without the possibility of parole should be held unconstitutional.

Respectfully submitted,

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APPENDIX A*

ALABAMA

Laws establishing minimum age for rights and responsibilities: Ala. Code § 13A-6-70 (West) (child 15 or younger incapable of consent to sexual activity). *Id.* §§ 30-1-4, 30-1-5 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent). *Id.* § 8-17-222 (sale of fireworks to child 15 or younger prohibited unless accompanied by adult). *Id.* § 26-1-3.1 (child 15 or younger not permitted to donate blood; 16-year-old may donate blood, but only with parental consent). *Id.* § 32-5A-282 (child 15 or younger required to wear helmet when riding bicycle). *Id.* §§ 32-6-7, 32-6-8, 32-5-64 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit only). *Id.* § 16-28-3 (child 17 or younger must attend school). *Id.* § 25-8-33 (child 15 or younger cannot be employed, with exceptions for certain agricultural work and limited work for 14- or 15-year-old outside school hours); *see also id.* § 25-8-36 (limiting hours 14- and 15-year-olds permitted to work). *Id.* §§ 34-5-5, 34-7A-22, 34-13-130 (child 15 or younger ineligible to be licensed as barber, cosmetologist, or embalmer's apprentice). *Id.* §§ 27-14-5, 27-34-21 (child 14 or younger incapable of contracting for insurance or joining fraternal benefit society). *Id.* § 22-8-4 (child 13 or younger cannot consent to

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* All statutes are current per Westlaw as of July 16, 2009. This appendix provides examples of relevant statutes and is not an exhaustive listing.

health services). *Id.* § 26-10A-7 (child 13 or younger can be adopted without his or her consent).

Laws extending extra protection to young adolescents: Ala. Code § 13A-5-40 (murder of child 13 or younger subject to capital punishment). *Id.* § 13A-6-69 (children 15 and younger protected from enticement for immoral purposes). *Id.* §§ 13A-6-62 to 13A-6-67 (children 15 and younger but older than 12 protected from sexual contact with older persons through various crimes criminalizing such contact regardless of consent). *Id.* § 13A-6-40 (children 15 and younger protected from kidnapping through provision stating that restraint is "without consent" even if child acquiesces, unless parent or guardian has given consent). 2009 Ala. Laws 745 (S.B. 120, approved by governor May 22, 2009) (children 15 and younger protected while using internet by creation of several felonies relating to use of computers to entice or lure children). Ala. Code § 32-5A-191 (enhanced penalty for driving under influence of alcohol when child 13 or younger in vehicle). *Id.* § 32-5-222 (penalizing driver of vehicle when child 14 or younger does not wear seat belt). *Id.* § 13A-13-6 (crime to cause child 15 or younger to engage in occupation with substantial risk to life or health). *Id.* §§ 15-25-2, 15-25-3 (child 15 or younger who is victim of sex crime protected through provision authorizing victim's videotaped deposition or closed-circuit testimony in criminal prosecution for sexual offense). *Id.* § 15-3-5 (no statute of limitations for sex offense against child 15 or younger).

ALASKA

Laws establishing minimum age for rights and responsibilities: Alaska Stat. Ann. § 11.41.436 (West) (child 15 or younger cannot consent to sex, except that child 13 to 15 can consent with person less than 4 years older). *Id.* § 25.05.171 (child 13 or younger cannot marry; child 14 or 15 may marry only with judicial and parental consent; child 16 or 17 may marry only with parental consent). *Id.* § 13.52.173 (child 15 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 09.55.590 (child 15 or younger ineligible for emancipation). *Id.* § 08.13.217 (minor may not receive tattoo, and may not receive body piercing without consent and presence of parent during procedure). *Id.* §§ 25.15.051, 25.15.057 (child 13 or younger cannot drive; child 14 or 15 may receive learner's permit or special/temporary license only). *Id.* § 14.30.010 (children 16 and younger must attend school, with certain limited exemptions). *Id.* §§ 23.10.330, 23.10.335 (child 13 or younger may not work, except in domestic work, baby-sitting, newspaper delivery, casing cans in canneries, or under direct supervision of parents); *see also id.* § 23.10.340 (limiting work hours for children 15 and younger); *id.* § 23.10.350 (child 15 or younger may not work in hazardous jobs; child 16 or 17 requires written exemption from state official to do so). *Id.* § 21.84.025 (child 14 or younger ineligible for adult membership in fraternal benefit society).

Laws extending extra protection to young adolescents: Alaska Stat. Ann. § 11.41.100 (homicide

elevated to first-degree murder where death of child 15 or younger occurs during sex offense, kidnapping, or course of physical abuse on child). *Id.* § 11.41.110 (negligent homicide elevated to second-degree murder where victim is child 15 or younger and defendant previously convicted of felony against child of such age). *Id.* §§ 11.41.452, 11.61.128 (protecting children 15 and younger from adult internet predators by punishing persons 18 or older who electronically distribute sexually explicit material to such children or use a computer to entice such children to engage in sexual conduct). *Id.* §§ 11.41.458, 11.41.460 (enhancing culpability for indecent exposure where done in presence of child 15 or younger). *Id.* § 11.41.260 (enhancing culpability for stalking where victim 15 or younger). *Id.* § 11.41.370 (for purposes of kidnapping, restraint is "without consent" even if child 15 or younger acquiesces, unless parent or guardian has given consent). *Id.* § 11.56.765 (protecting children 15 and younger by making it crime for witness to fail to report kidnapping, murder, or certain sex crimes against such children). *Id.* § 12.45.046 (child 15 or younger who is victim or witness to crime protected from mental or emotional strain of open-court testimony in criminal prosecution by provision allowing testimony by closed-circuit television or through one-way mirror).

ARIZONA

Laws establishing minimum age for rights and responsibilities: Ariz. Rev. Stat. Ann. §§ 13-1405,

13-1407 (West) (child 14 or younger incapable of consenting to sex, with exception for marriage; child 15 to 17 capable of consent only with spouse, person under 19, or person less than 2 years older than child with whom child attends high school). *Id.* § 25-102 (child 15 or younger cannot marry without parental consent and judicial approval; child 16 or 17 requires parental consent). *Id.* § 44-134 (child 15 or younger incapable of consenting to donate blood; child 16 or 17 may not do so without parental consent). *Id.* § 36-843 (child too young to apply for driver's license cannot consent to organ donation, unless emancipated); *cf. id.* § 28-3153 (child 14 or younger cannot drive; children 15 to 17 progressively eligible for learner's permits and restricted licenses); *id.* § 12-2451 (child 15 or younger ineligible for emancipation). *Id.* § 15-802 (children between ages 6 and 16 must attend school). Ariz. Const. art. 18 § 2 (child 13 or younger may not be employed during school hours; child 15 or younger may not be employed in mines, hazardous occupations, or for more than 8 hours a day). Ariz. Rev. Stat. Ann. § 32-322 (child 15 or younger ineligible for barber's license). *Id.* §§ 20-865, 20-1106 (child 14 or younger incompetent to contract for insurance or adult membership in fraternal benefit society). Ariz. R. Civ. P. 4.1 (summons for child 15 or younger must be served on child and parent or guardian). Ariz. Rev. Stat. Ann. § 36-881 (for purposes of regulating day care centers, child defined as person 14 or younger).

Laws extending extra protection to young adolescents: Ariz. Rev. Stat. Ann. § 13-705 (providing

enhanced penalties for dangerous crimes committed by adults against children, including specific category of enhanced penalties where victim is child 12 to 14). *Id.* § 13-751 (enhanced mandatory minimum sentence for murder of child 14 or younger). *Id.* §§ 13-1402 to 13-1406, 13-1410, 13-1419, 13-3206 (enhancing culpability for various sexual offenses where victim is child 14 or younger). *Id.* § 13-3407.01 (separate crime to manufacture methamphetamine under circumstances causing physical injury to child 14 or younger). *Id.* § 28-1383 (enhanced penalty for driving while intoxicated when child 14 or younger in vehicle); *see also id.* § 5-396 (same for operation of watercraft). *Id.* § 28-909 (penalizing driver of vehicle when child 15 or younger fails to wear seat belt). *Id.* §§ 13-4251, 13-4253 (child 14 or younger who is victim of or witness to crime may be permitted to testify in criminal prosecution via closed-circuit television or videotape instead of in open court).

ARKANSAS

Laws establishing minimum age for rights and responsibilities: Ark. Code Ann. §§ 5-14-103, 5-14-124 to 5-14-27 (West) (child 15 or younger cannot consent to sexual activity with person 20 or older, with exception for marriage; child 13 or younger cannot consent to sexual activity with person more than 3 years older). *Id.* §§ 9-11-102, 9-11-103 (males 16 and younger and females 15 and younger cannot contract for marriage; others 17 and younger cannot do so without parental consent; exception allowed upon

court order where couple has child or female is pregnant). *Id.* § 20-27-301 (child 15 or younger prohibited from donating blood; 16-year-old requires parental consent). *Id.* § 20-17-1204 (child 15 or younger incapable of consenting to organ donation, unless emancipated minor); *cf. id.* § 9-27-362 (child 16 or younger may not be emancipated). *Id.* § 27-16-604 (child 13 or younger cannot drive; eligible for learner's permit at 14, intermediate driver's license at 16); *see also id.* § 27-101-602 (child 15 or younger may not operate personal watercraft unaccompanied). *Id.* § 6-18-201 (children 17 and younger must attend school). *Id.* § 11-6-104 (child 13 or younger barred from work in remunerative occupation, except employment by parents during school vacation). *Id.* §§ 11-6-105, 11-6-106 (children 15 and younger barred from employment in certain dangerous activities). *Id.* § 23-89-511 (child 15 or younger cannot operate amusement park ride). *Id.* § 17-26-304 (child 15 or younger cannot be licensed as cosmetologist, manicurist, or esthetician); *see also id.* § 17-20-302 (minimum age 16.5 for barber's license). *Id.* § 23-74-201 (child 14 or younger cannot hold adult membership in fraternal benefit society). *Id.* § 9-26-104 (court cannot remove disability of minor to transact business for children 15 and younger). *Id.* § 12-61-101 (male children 16 and younger not eligible for mandatory state militia). *Id.* § 28-1-113 (child 13 or younger not competent to waive interest in probate hearing). Ark. R. Civ. P. 4 (child 13 or younger not competent to accept service for another at their place of residence; if person to be

served is 13 or younger, parent or guardian must be served instead).

Laws extending extra protection to young adolescents: Ark. Code Ann. § 5-10-101 (homicide elevated to capital murder where victim 14 or younger and defendant 18 or older). *Id.* § 5-10-102 (homicide elevated to first-degree murder where victim 14 or younger). *Id.* §§ 5-4-501, 5-14-103 (enhanced penalties for sexual offenses against child 13 or younger). *Id.* § 5-14-110 (crime for person 18 or older to cause child 14 or younger to expose himself, or to solicit such child for sexual activity). *Id.* § 5-16-102 (enhanced penalty for voyeurism where victim 16 or younger). *Id.* § 5-14-129 (children 15 and younger protected by provision prohibiting sex offenders from employment involving interaction with such children). *Id.* § 5-27-306 (protecting children 15 and younger from internet stalking). *Id.* § 5-11-101 (restraint of child 13 or younger can be kidnapping regardless of child's acquiescence, unless parent or guardian has given consent). *Id.* § 5-65-111 (enhanced penalty for operating motor vehicle while intoxicated when child 15 or younger in car). *Id.* § 16-10-130 (criminal trials involving victims 13 or younger shall be given precedence). *Id.* § 16-44-203 (child 16 or younger who is victim of sex offense protected through rule authorizing testimony of child by videotaped deposition in criminal prosecution). *Id.* § 9-27-510 (child 15 or younger cannot be transported to adult prison even when serving adult sentence). Ark. R.

Crim. P. 11.2 (child 13 or younger incompetent to consent to individual search).

CALIFORNIA

Laws establishing minimum age for rights and responsibilities: Cal. Penal Code § 261.5 (West) (child 17 or younger incapable of consenting to sexual intercourse except with spouse). Cal. Fam. Code § 302 (child 17 or younger requires judicial and parental consent to marry). Cal. Health & Safety Code § 12689 (sale of "safe and sane" fireworks to child 15 or younger prohibited; sale of "dangerous" fireworks or "rocket" to child 17 or younger prohibited). *Id.* § 1607.5 (child 14 or younger incapable of donating blood; 15- or 16-year-old requires parental consent). *Id.* § 7150.15 (child 14 or younger incapable of consenting to organ donation, unless emancipated minor; child between 15 and 18 requires parental consent). Cal. Veh. Code § 12509, 12512-12514, 12814.6 (child 13 or younger cannot drive; 14-year-old eligible for junior permit under extraordinary circumstances; child 15 years, six months eligible for instruction permit; 16- and 17-year-olds eligible for provisional license only); *see also* Cal. Harb. & Nav. Code § 658.5 (child 15 or younger prohibited from operating certain vessels). Cal. Educ. Code § 48200 (children 6 or older but not older than 17 must attend school, with some exemptions); *see also, e.g., id.* § 48232 (child 15 or older may take leave of absence from school). Cal. Labor Code §§ 1290, 1292, 1293, 1294.5, 1297 (children 15 or younger prohibited from employment in dangerous jobs or

tasks); *see also id.* § 1294.3 (children 14 or 15 allowed only limited employment); *id.* § 1391 (limiting hours of employment for all minors, with extra limitations for children 15 and younger). Cal. Bus & Prof. Code §§ 2866, 7321, 7321.5, 7326 (child 16 or younger ineligible to be licensed as vocational nurse, cosmetologist, barber, manicurist). *Id.* § 22706 (child 13 or younger prohibited from using tanning bed; child 14 to 17 must have parental consent). *Id.* § 3365.6 (child 16 or younger cannot buy hearing aid without recommendation from doctor or audiologist). *Id.* § 18702 (child 15 or younger ineligible to be licensed as contestant in boxing, wrestling, or martial arts match; child 16 to 18 may compete as amateur only). Cal. Ins. Code § 10112 (child 15 or younger requires parental consent to contract for insurance); *see also id.* § 11023 (child 14 or younger ineligible for admission to fraternal benefit society). Cal. Fam. Code § 7120 (child 13 or younger ineligible to become emancipated minor).

Laws extending extra protection to young adolescents: Cal. Penal Code § 653j (protecting children 15 and younger from vulnerability to influence by making it a crime for person 18 or older to solicit, induce, or encourage child of such age to commit certain violent felonies). *Id.* §§ 207, 288, 288.5 (protecting children 13 and younger from sexual abuse by criminalizing lewd and lascivious conduct or enticement or persuasion of child to another place with intent to commit such conduct); *see also id.* § 272 (crime for person 21 or older to persuade, lure, or transport child 13 or younger away from home

without express parental consent); *id.* §§ 208, 667.8 (enhanced punishment for kidnapping of child 13 or younger); *id.* § 190.2 (enhanced penalty for murder if during commission of lewd and lascivious act on child 13 or younger). *Id.* §§ 266h-266k (enhanced penalties for pimping, pandering with, or procuring for purposes of prostitution child 15 or younger); *see also id.* §§ 269, 288.5 (enhanced punishment for certain sexual offenses against child 13 or younger). *Id.* § 271a (criminalizing parental abandonment or neglect of child 13 or younger). *Id.* § 152.3 (protecting children 13 and younger by making it crime for witness to fail to report rape, murder, or certain sexual abuse of such children). *Id.* § 14205 (missing person report for child 15 or younger given special priority). *Id.* § 310 (crime to admit child 15 or younger to prizefight or cockfight). Cal. Labor Code § 1308 (crime to cause child 15 or younger to engage in dangerous employment). Cal. Civ. Proc. Code § 36 (child 13 or younger entitled to have personal injury suit given preference on court calendar); *id.* § 1219.5 (child 15 or younger protected by special procedures before court may impose contempt for refusal to testify or take oath). Cal. Penal Code §§ 1346, 1347 (adolescent victims of sex crime protected from emotional trauma through provisions authorizing use of videotaped deposition of victim 15 or younger or closed-circuit testimony of victim 13 or younger in criminal prosecution). Cal. Veh. Code § 23572 (enhanced penalty for driving under influence of alcohol when child 13 or younger in vehicle). *Id.* § 27360.5 (penalizing driver of vehicle when child 15 or younger does not wear seat

belt). Cal. Welf. & Inst. Code § 211 (children 15 and younger not to be housed in Department of Corrections facility; children 13 and younger not to be transferred to state prison).

COLORADO

Laws establishing minimum age for rights and responsibilities: Colo. Rev. Stat. Ann. § 18-3-402 (West) (child 14 or younger incapable of consent to sexual activity except with persons less than four years older; child 15, 16 or 17 incapable of consent except with persons less than ten years older). *Id.* §§ 14-2-108, 14-2-106, *amended in nonpertinent part by* 2009 Colo. Legis. Serv. 264 sec. 5 (West) (S.B. 09-068, approved May 15, 2009, eff. July 1, 2009) (child 16 or 17 may not contract for marriage without parental consent; child 15 or younger may not marry without parental and judicial consent). *Id.* § 12-28-102 (child 15 or younger prohibited from purchasing fireworks). Colo. Rev. Stat. Ann. § 13-22-104, *amended by* 2009 Colo. Legis. Serv. 27 (H.B. 09-1023, approved Mar. 19, 2009, eff. Aug. 5, 2009) (child 15 or younger incapable of donating blood; child 16 or 17 may not do so without parental consent). Colo. Rev. Stat. Ann. §§ 12-34-104, 13-22-103 (child 17 or younger incapable of making anatomical gift decision, unless child 15 or older is financially independent and living separately from parents). *Id.* §§ 42-2-104, 42-2-106, *amended in nonpertinent part by* 2009 Colo. Legis. Serv. 281 sec. 24 (H.B. 09-1026, approved May 20, 2009, eff. Oct. 1, 2009) (child 14 or younger cannot

drive; 15-year-old eligible for learner's permit only). *Id.* § 22-33-104, *amended in nonpertinent part by* 2009 Colo. Legis. Serv. 290 sec. 3 (H.B. 09-1243, approved May 21, 2009) (children between 6 and 16 years old must attend school). *Id.* § 8-12-105 (child 13 or younger cannot be employed except in very limited occupations; child 15 or younger prohibited from working during certain nighttime hours). *Id.* § 8-12-108 (child 14 or 15 limited in permissible occupations). *Id.* § 8-12-109 (child 15 or younger prohibited from employment involving operation of a motor vehicle). *Id.* § 12-8-114 (child 15 or younger ineligible to be licensed as a barber or cosmetologist). *Id.* § 10-4-104 (child 15 or younger incapable of contracting for insurance). *Id.* § 10-14-201 (child 14 or younger incapable of joining fraternal benefit society). *Id.* § 27-10-103 (child 14 or younger may not consent to mental health services). *Id.* § 12-9-107 (child 13 or younger may not assist in the conduct of bingo or pull tabs).

Laws extending extra protection to young adolescents: Colo. Rev. Stat. Ann. § 18-3-305 (children 14 and younger protected from enticement). *Id.* § 18-3-306, *amended in nonpertinent part by* 2009 Colo. Legis. Serv. 341 sec. 2 (H.B. 09-1132, approved June 1, 2009, eff. July 1, 2009) (children 14 and younger protected from internet luring by persons more than four years older). *Id.* § 18-3-405 (children 14 and younger protected from sexual assault by persons at least four years older). *Id.* § 16-11-301 (when juvenile is sentenced to department of corrections,

executive director must consider child's safety and well being in determining where to house child and with whom child has contact). *Id.* § 18-3-413 (child 14 or younger who is the victim of sex crime protected through provision authorizing victim's videotaped deposition in criminal prosecution for sexual offense).

CONNECTICUT

Laws establishing minimum age for rights and responsibilities: Conn. Gen. Stat. Ann. § 53a-73a (West) (child 13, 14, or 15 incapable of consenting to sexual intercourse with person more than 3 years older). *Id.* § 46b-30 (child 15 or younger cannot marry without judicial consent; child 16 or 17 must have parental consent). *Id.* § 29-357 (repealed and replaced with provision identical in pertinent part eff. Jan. 1, 2011, *see* 2009 Conn. Legis. Serv. 09-177 sec. 17 (West)) (child 15 or younger may not purchase or use sparklers or fountains). *Id.* § 19a-285a (child 16 or younger may not donate blood without parental consent). *Id.* § 17a-79 (child 13 or younger not competent to admit self voluntarily to mental hospital). *Id.* § 14-286d (child 15 or younger prohibited from riding bicycle without helmet on public highway). *Id.* § 14-36, *amended by* 2009 Conn. Legis. Serv. 09-187 sec. 2 (West) (child 15 or younger prohibited from driving motor vehicle, child aged 16 and 17 may drive with learner's permit when accompanied by licensed adult over 20). *Id.* § 31-25 (child 15 or younger may not operate elevator). *Id.* §§ 31-23 to 31-24 (placing various restrictions on employment of children 13 or

younger, children 14 or 15, and, to lesser extent, children 16 or 17). *Id.* § 19a-102a (child 15 or younger may not sign form necessary to buy turtle; parent or guardian must sign). *Id.* § 7-172 (child 15 or younger may not sell or promote bazaar or raffle tickets).

Laws extending extra protection to young adolescents: Conn. Gen. Stat. Ann. § 53a-90a (child 15 or younger protected while using internet through laws prohibiting enticement or luring via interactive computer service). *Id.* §§ 53a-86 to 53a-88 (enhanced culpability for promoting prostitution where victim 15 or younger and, to lesser extent, where victim 16 or 17). *Id.* § 14-100a (driver required to ensure all passengers 15 and younger wear seat belt); *see also id.* § 14-272a (penalizing driver who allows child 15 or younger to ride in open bed of truck without appropriate safety belt). *Id.* § 10-197 (mandating fine for any person who employs child 13 or younger during school hours). *Id.* § 17-408 (child 15 or younger may not be committed to community correctional center or almshouse).

DELAWARE

Laws establishing minimum age for rights and responsibilities: Del. Code Ann. tit. 11, § 761 (West) (child 15 or younger incapable of consent to sexual act with person more than 4 years older). *Id.* tit. 13, § 709 (child 16 or younger may not donate blood without parental permission). *Id.* tit. 21, § 2710 (child 15 or younger cannot drive; 16-year-old eligible

for learner's permit only). *Id.* tit. 14, § 2702 (children 15 and younger must attend school). *Id.* tit. 19, § 505 (child 13 or younger cannot be employed); *see also id.* § 506 (children 15 and younger prohibited from certain hazardous occupations and hours of employment).

Laws extending extra protection to young adolescents: Del. Code Ann. tit. 11, § 783 (taking or enticing child 15 or younger from custody of parents punishable as kidnapping). *Id.* § 1112A (children 15 and younger protected from sexual solicitation of a child). *Id.* §§ 764, 765 (enhanced penalty for indecent exposure when in presence of child 15 or younger). *Id.* § 787 (enhanced penalty for sexual servitude of minor if victim 13 or younger). *Id.* § 1101 (enhanced penalty for child abandonment if child 13 or younger). *Id.* tit. 21, § 4177 (enhanced penalties for driving under influence of alcohol or drugs when child 16 or younger in car). *Id.* § 4803 (penalizing driver of car when child 15 or younger does not wear seat belt). *Id.* tit. 11, § 4204A (children 15 and younger protected from incarceration with adults).

DISTRICT OF COLUMBIA

Laws establishing minimum age for rights and responsibilities: D.C. Code §§ 22-3001, 22-3008, 22-3009 (West) (child 15 or younger incapable of consent to sexual activity, except with persons less than 4 years older). *Id.* §§ 46-403, 46-411 (child 15 or younger incapable of consenting to marriage; child 16

or 17 may do so only with parental consent). *Id.* § 7-1531.03 (child 15 or younger cannot consent to organ donation, unless emancipated). *Id.* § 2-1542, 2-1543 (children 16 and younger subject to mandatory curfew). *Id.* § 50-1605 (children 15 and younger required to wear bicycle helmets; parents may be fined for violation). *Id.* § 50-1401.01 (child 15 or younger cannot drive; 16-year-old eligible for learner's permit only). *Id.* § 32-201 (child 13 or younger cannot be employed, with exceptions for agricultural work, domestic work, and newspaper delivery); *see also id.* § 32-202 (limiting hours that 14- or 15-year-olds may work, and to lesser extent limiting hours that 16- and 17-year-olds may work); *id.* § 32-204 (children 15 and younger prohibited from employment in occupations involving power machinery).

Laws extending extra protection to young adolescents: D.C. Code §§ 22-3008 to 22-3011 (children 15 and younger protected from sexual contact with persons at least 4 years older through various crimes criminalizing such contact regardless of consent). *Id.* § 22-1312 (elevating punishment for indecent exposure and lewdness when committed in presence of child 15 or younger). *Id.* § 22-1102 (criminalizing neglect of a child 13 or younger). *Id.* § 50-1802 (if vehicle has more passengers than seat belts, driver shall insure that children 15 and younger have preference to positions with seat belts).

FLORIDA

Laws establishing minimum age for rights and responsibilities: Fla. Stat. Ann. §§ 794.05, 800.04 (West) (child 15 or younger may not consent to sexual activity; unemancipated child 16 or 17 may not consent to sexual activity with a person 24 or older). *Id.* § 741.0405 (child 15 or younger may not get married, with limited exception that judge may issue license for child who is pregnant or has given birth; child 16 or 17 may not marry without written notarized parental consent, unless parents are deceased or child has been married previously). *Id.* § 743.06 (child 16 or younger not eligible to consent to donation of his blood or tissue without parental consent). *Id.* § 316.2065 (bicycle rider or passenger 15 or younger must wear helmet). *Id.* §§ 322.05, 322.16 (child 14 or younger prohibited from driving; 15-year-old eligible for learner's permit only; 16- or 17-year-old subject to limitations on hours and circumstances under which he or she may drive). *Id.* §§ 316.2068, 316.2074, 261.20, 316.211 (children 15 and younger required to wear helmets and other appropriate safety gear when riding on or operating all-terrain vehicle, off-highway vehicle, electric assistive mobility device, or moped). *Id.* §§ 316.003, 316.2085 (child 15 or younger may not operate motorized bicycle or motorcycle with more than 150 cubic centimeter displacement). *Id.* § 316.212 (child 14 or younger may not operate golf cart on public street). *Id.* § 316.2127 (child 13 or younger may not operate utility vehicle on public street). *Id.* § 327.39 (child 13 or younger

may not operate personal watercraft). *Id.* § 1003.21, *amended by* 2009 Fla. Sess. Law Serv. 164 sec. 7 (West) (C.S.H.B. 597, approved June 11, 2009, eff. July 1, 2009) (children between ages 6 and 16 must attend school). *Id.* § 450.021 (child 13 or younger cannot be employed except for certain agricultural and domestic work, in the entertainment industry, or as page for Florida Legislature); *see also id.* § 450.061 (child 15 or younger barred from working in wide range of occupations and industries, including meat packing, power-operated laundry, power-operated baking, dry cleaning, spray painting, alligator wrestling, door-to-door sales except for non-profit organization such as the Boy Scouts or Girl Scouts of America, elevator repair, working with meat and vegetable slicing machines, and working in meat freezers or coolers, with limited exceptions); *id.* § 450.081 (regulating and restricting work hours for children 15 and younger and, to lesser extent, children 16 and 17). *Id.* § 476.114 (child 15 or younger ineligible to be licensed as barber). *Id.* § 627.406 (child 14 or younger at nearest birthday not competent to contract for life, health, property, or other insurance). *Id.* § 48.031 (child 14 or younger not competent to receive service of process for another person residing at child's residence in that person's absence); *see also* Fla. R. Civ. P. 1.080; Fla. R. Crim. P. 3.030, Fla. R. Juv. P. 8.085 (same). Fla. Prob. R. 5.636, 5.690 (in certain civil actions involving children 13 or younger, child not entitled to service of court papers). Fla. Stat. Ann. § 381.89 (child 13 or younger prohibited from using tanning device unless accompanied by parent).

Id. § 381.0075 (child 15 or younger may not undergo body piercing unless accompanied by parent or guardian; child 16 or 17 must have written notarized parental consent). *Id.* § 877.04 (body of child 17 or younger shall not be tattooed without written notarized consent by parent or legal guardian). *Id.* § 548.069 (child 15 or younger may not attend professional boxing match or other pugilistic exhibition unless accompanied by adult). *Id.* § 744.312 (when court appoints guardian for child 13 or younger, child not entitled to have his or her preferences considered as to who should be appointed).

Laws extending extra protection to young adolescents: Fla. Stat. Ann. § 784.048 (enhanced penalties for stalking or cyberstalking of child 15 or younger). *Id.* § 800.04 (protecting children 15 and younger from sexual contact with older persons through variety of restrictions on such contact). *Id.* § 794.05 (protecting children aged 16 and 17 from sexual activity with adults 24 and older, unless child has had disabilities of nonage removed). *Id.* § 796.045 (enhanced penalties for sexual trafficking of child 13 or younger). *Id.* § 810.145 (enhanced penalties for video voyeurism offense involving certain adult offenders where victim is child 15 or younger). *Id.* § 827.04 (person 21 or older who impregnates child 15 or younger commits act of child abuse regardless of consent and in addition to separately-charged offense under Fla. Stat. § 800.04). *Id.* § 742.107 (girl 15 or younger who gives birth to child must reveal identity of father and cooperate with paternity

testing to facilitate criminal prosecution of individuals age 21 or older). *Id.* § 893.13 (enhanced penalties for certain narcotics offenses where offense takes place in the presence of child 15 or younger or causes great bodily harm to such child). *Id.* §§ 92.53, 92.54 (child witness or victim who is 15 years old or younger may provide videotaped testimony or testify via closed-circuit television in lieu of testifying in open court where there is a substantial likelihood that child would otherwise suffer at least moderate emotional or mental harm.) *Id.* §§ 92.55, 914.16, 918.16 (authorizing additional protections for child witnesses aged 15 or younger); *see also* Fla. R. Crim. P. 3.220, Fla. R. Juv. P. 8.060 (same). *Id.* § 918.0155 (special provision for expeditious handling of criminal cases involving allegations of child abuse or unlawful sexual contact with child 15 or younger). *Id.* § 394.4785 (child 13 or younger who is admitted to mental health treatment facility may not be placed in bedroom or ward or share common areas with adult patients, unless doctor finds medical necessity or for reasons of safety). *Id.* § 316.614 (unlawful to operate motor vehicle unless passengers 17 and younger wear safety belt or child restraint device). *Id.* § 784.05 (felony offense for individual to negligently leave loaded firearm within reach or easy access of child 15 or younger, where child obtains firearm and uses it to inflict injury or death upon himself or another, with some limited exceptions). *Id.* § 847.013 (protecting children 16 and younger from motion pictures or similar presentations harmful to minors by imposing criminal liability on person who knowingly exhibits or

rents to child 16 or younger a movie or videocassette depicting nudity or certain sexual conduct).

GEORGIA

Laws establishing minimum age for rights and responsibilities: Ga. Code Ann. § 16-6-3 (West) (child 15 or younger cannot consent to sex except with spouse). *Id.* § 19-3-2 (child 15 or younger may not marry; child 16 or 17 may not marry without parental consent). *Id.* § 44-5-89 (child 16 or younger ineligible to donate blood without parental consent). *Id.* § 44-5-142 (child 15 or younger ineligible to make anatomical gift, unless emancipated); *cf. id.* §§ 15-11-200 to 15-11-202 (child 15 or younger ineligible for emancipation). *Id.* § 40-6-296 (child 15 or younger must wear helmet when riding bicycle). *Id.* § 40-5-24 (child 14 or younger may not drive; 15-year-old eligible for instruction permit only). *Id.* § 20-2-690.1 (children 15 and younger must attend school). *Id.* §§ 39-2-1, 39-2-2 (child 15 or younger prohibited from working in any mill, factory, laundry, manufacturing establishment, workshop, or any occupation designated hazardous by Commissioner of Labor as being dangerous to life and limb or injurious to health or morals of child); *see also id.* § 34-13-12 (child 15 or younger prohibited from operating carnival rides); *id.* §§ 39-2-3, 39-2-4, 39-2-6 (limiting work hours for children 15 and younger). *Id.* § 19-8-5 (child 13 or younger may be adopted without his consent).

Laws extending extra protection to young adolescents: Ga. Code Ann. § 16-5-21 (enhanced

penalties for aggravated assault of child 13 or younger). *Id.* § 16-6-22.1 (enhanced penalty for sexual battery of child 15 or younger). *Id.* § 16-6-5 (protecting children 15 and younger from enticement for indecent purposes). *Id.* § 16-6-4 (protecting children 15 and younger from molestation, from exposure to indecent or immoral acts, and from images of such acts). *Id.* § 40-6-391 (enhanced culpability for driving while impaired by alcohol or drugs with child 13 or younger in vehicle; driver may be separately charged with both DWI and endangering child). *Id.* § 17-3-2.1 (for enumerated crimes against children 15 and younger, statute of limitations does not begin to run until child reaches age of 16 or offense is reported to the authorities, whichever is earlier).

HAWAII

Laws establishing minimum age for rights and responsibilities: Haw. Rev. Stat. Ann. § 707-730 (West) (child 13 or younger incapable of consent to sexual activity). *Id.* § 707-732 (child 14 or 15 incapable of consent to sexual activity with person 5 or more years older). *Id.* §§ 572-1, 572-2 (unlawful for child 14 or younger to marry under any circumstances; 15-year-old child may marry with approval from family court judge and parental consent; child 16 or 17 may do so with parental consent only). *Id.* § 327-4 (child incapable of consenting to donate organs unless emancipated or old enough to apply for driver's license); *cf. id.* § 286-102.6 (child 16 or older may apply for provisional driver's license). *Id.* § 291C-150

(child 15 or younger required to wear helmet when riding bicycle). *Id.* §§ 286-102.6, 286-110 (child 14 or younger cannot drive; child 15 years, 6 months eligible for instruction permit only; child 16 eligible for provisional license only). *Id.* § 302A-1132 (children 17 or younger must attend school). *Id.* § 390-2 (regulating employment and labor by all children 17 and younger with greater restrictions on children 14 and 15 and still greater restrictions on children 13 and younger, who are ineligible for employment with exceptions for theatrical performances and coffee harvesting).

Laws extending extra protection to young adolescents: Haw. Rev. Stat. Ann. §§ 707-730, 707-732, 707-733.6 (children 15 and younger protected from sexual contact with older persons through various crimes criminalizing such contact regardless of consent). *Id.* § 626-1, Haw. R. Evid. 804 (statements of children 15 and younger regarding sexual abuse permitted as evidence if child is unavailable as witness). *Id.* ch. 626, Haw. R. Evid. 616 (protecting child victim of sexual offense 17 or younger from emotional distress and impairment of ability to communicate by allowing child to testify in criminal prosecution via two-way closed-circuit television). *Id.* § 291-11.6, *amended by* 2009 Haw. Sess. Laws 151 sec. 5 (S.B. 1142, approved June 25, 2009) (providing penalty for operating motor vehicle with child 8 to 14 not wearing seat belt). *Id.* § 709-902 (children 13 and younger protected from abandonment).

IDAHO

Laws establishing minimum age for rights and responsibilities: Idaho Code Ann. § 18-1506 (West) (child 15 or younger incapable of consent to sexual activity with any person over 18). *Id.* § 18-1508A (child aged 16 or 17 incapable of consent to sexual activity with person 5 or more years older). *Id.* § 32-202 (child 15 or younger may not marry unless parents consent and judge satisfied that both parties are capable of assuming full marital duties; child 16 or 17 may not marry without parental consent). *Id.* § 39-3701 (child 16 or younger ineligible to donate blood without parental consent). *Id.* § 39-3404 (child 15 or younger incompetent to make decision to donate organs unless emancipated minor; child 15 or 17 may not make such decision without written parental consent). *Id.* § 18-1523 (child 13 or younger prohibited from obtaining tattoo or body piercing; child 14 to 17 may not do so without parental consent). *Id.* § 46-307 (child aged 14 and a half to 17 eligible for training instruction and temporary driving permit); *see also id.* § 46-307A (child aged 14 or 15 eligible for limited school attendance driving permit only if no school bus service available). *Id.* § 33-202 (children between the ages of 7 and 15 must attend school). *Id.* § 44-1301 (no child 13 or younger may be employed in a factory, mine, store, restaurant or hotel, nor be employed during school hours); *see also id.* § 44-1304 (no child 15 or younger may be employed for more than 9 hours in a day or 54 hours in a week, or before 6 a.m. or

after 9 p.m.). *Id.* § 37-3102 (information concerning the drug treatment of any person aged 16 or older will not be disclosed to a parent or legal guardian without consent). *Id.* § 39-3801 (any person aged 14 or older who may have come into contact with a contagious disease may give consent to medical care, without consent of parents). *Id.* § 41-1807 (child 14 or younger not competent to contract for life, health, or property insurance). *Id.* § 16-2428 (in the pursuance of mental health services, no person may disclose confidential statements made by a child over 14 to the child's parents or others without the child's written permission, unless such information is needed for a treatment plan or required by a court of law).

Laws extending extra protection to young adolescents: Idaho Code Ann. § 18-1508 (protecting children 15 and younger from subjection to lewd or lascivious conduct). *Id.* § 18-1508A (protecting children 16 and 17 from sexual contact with any person at least 5 years older). *Id.* § 18-1509 (protecting children 15 and younger from solicitation). *Id.* § 18-1509A (protecting children 15 and younger from solicitation over internet). *Id.* § 6-701 (tort action may be brought against any person who has committed lewd or lascivious acts on child 15 or younger). *Id.* § 18-3308 (crime to sell or give explosives, most types of ammunition, or firearms to any child 15 or younger without written parental consent).

ILLINOIS

Laws establishing minimum age for rights and responsibilities: 720 Ill. Comp. Stat. Ann. 5/12-15 (West) (child 16 or younger incapable of consent to sexual activity). 750 Ill. Comp. Stat. Ann. 5/203, 5/208 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent). 210 Ill. Comp. Stat. Ann. 15/1 (child 15 or younger incapable of donating blood; 16-year-old requires parental consent). 625 Ill. Comp. Stat. Ann. 5/6-103 (child 14 or younger cannot drive; 15-year-old eligible for instruction permit only). 105 Ill. Comp. Stat. Ann. 5/26-1 (children between the ages of 7 and 17 must attend school). 820 Ill. Comp. Stat. Ann. 205/1, 205/13, 205/7 (limiting hours and occupations that 14- or 15-year-old permitted to work). 225 Ill. Comp. Stat. Ann. 85/9, 320/3, 410/2-2, 410/3-2, 410/3A-2, 410/3C-2 (child 15 or younger ineligible to be licensed as a pharmacy technician, plumber's apprentice, barber, cosmetologist, aesthetician, or nail technician). 215 Ill. Comp. Stat. Ann. 5/242, 5/287.1 (child 14 or younger incapable of contracting for insurance or joining fraternal benefit society). 750 Ill. Comp. Stat. Ann. 50/12 (child 13 or younger can be adopted without his or her consent).

Laws extending extra protection to young adolescents: 720 Ill. Comp. Stat. Ann. 5/10-5.1 (children 14 and under protected while using internet by creation of felony relating to use of electronic communications to lure children). *Id.* 5/11-19.2 (children 15 and younger protected from criminal child exploitation).

625 Ill. Comp. Stat. Ann. 5/11-501 (enhanced penalty for driving while intoxicated when child 15 or younger in car). 730 Ill. Comp. Stat. Ann. 5/5-8-6 (children 16 and younger protected from placement in adult correctional facility).

INDIANA

Laws establishing minimum age for rights and responsibilities: Ind. Code Ann. § 35-42-4-9 (West) (children 14 and 15 incapable of consent to sexual activity with persons 18 or older). *Id.* §§ 31-11-1-5, 31-11-1-6, 31-11-2-1 to 31-11-2-3 (child 16 or younger incapable of contracting for marriage, except with judicial consent in case of pregnancy when both male and female are at least 15; child 17 may not marry without parental consent). *Id.* § 22-11-14-8 (child 15 or younger may not sell fireworks). *Id.* § 16-36-1-3 (child 13 or younger cannot consent to health services; child 16 or younger may not donate blood). *Id.* § 29-2-16.1-3 (child 14 or younger incapable of making anatomical gift decision unless emancipated minor). *Id.* §§ 9-24-3-2, 9-24-7-1 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit; 16-year-l-month-old eligible for driver's license). *Id.* §§ 31-37-3-2, 31-37-3-3 (children 14 and younger subject to curfew; prohibited from being in a public place between 11 p.m. and 5 a.m. on any day; children 15 to 17 also prohibited except that they may be in a public place until 1 a.m. on Saturday or Sunday). *Id.* § 20-33-3-31 (children 14 and younger cannot be employed, with exceptions for certain agricultural

work and limited work outside school hours). *Id.* § 20-33-3-22 (limiting hours 14- and 15-year olds are permitted to work). *Id.* § 25-7-10-3 (child 16 or younger ineligible to be licensed as a barber; person aged 17 must have graduated high school to obtain license). *Id.* § 25-28.5-1-18.1 (child 16 or younger ineligible to be registered as an apprentice plumber). *Id.* § 27-1-12-15 (child younger than 15-½ incapable of contracting for insurance). *Id.* § 27-11-3-1 (child 14 or younger incapable of joining fraternal benefit society). *Id.* § 25-8-15.4-15 (children 15 and younger must be accompanied by a parent when using a tanning device at a tanning facility). *Id.* § 31-19-9-1 (child 13 or younger can be adopted without his or her consent). *Id.* § 22-15-7-8 (child 15 or younger cannot operate regulated amusement device). Ind. Const. Art. 12, § 1 (children 16 and younger not included in state militia). Ind. Trial Proc. R. 4.2 (personal service not required for child 13 or younger, only required for child's next friend, guardian ad litem, or either parent).

Laws extending extra protection to young adolescents: Ind. Code Ann. § 35-42-4-3 (children 13 and younger protected from child molestation). *Id.* § 35-42-4-4 (elevating punishment for possession of child pornography when child depicted is 15 or younger). *Id.* § 35-42-4-5 (elevating punishment for vicarious sexual gratification when child involved is 13 or younger). *Id.* § 35-42-4-6 (children 15 and younger protected from solicitation of sexual acts, with elevated punishments when solicited using a

computer). *Id.* §§ 35-37-4-6, 35-37-4-8 (child 13 or younger who is a victim of certain serious offenses protected through provisions allowing admission of out-of-court statement or videotape or closed-circuit testimony in criminal prosecution for serious offense). *Id.* § 9-19-11-3.6 (failure of vehicle operator to restrain child 15 or younger but older than 8 constitutes traffic violation). *Id.* § 35-42-2-1 (enhancing penalties for battery when victim is a child 13 or younger or battery is committed in presence of child 15 or younger). *Id.* § 35-42-2-1.3 (enhancing penalty for domestic battery when committed in presence of child 15 or younger). *Id.* § 11-10-2-10 (committed delinquent 16 or younger may not be transferred to adult facility). *Id.* § 11-13-3-4 (parole board may require released sex offender to avoid contact with children 15 and younger absent board approval or completion of specified treatment program). *Id.* § 36-8-10-5 (county prison matron for each county shall care for all female prisoners and male children 13 and under in any detention center in county).

IOWA

Laws establishing minimum age for rights and responsibilities: Iowa Code Ann. § 709.4 (West) (child 13 or younger incapable of consent to sex; child 14 or 15 incapable of such consent, except with person less than 4 years older). *Id.* § 595.2 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent and judicial approval), *invalidated in part on other*

grounds by Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). *Id.* § 599.6 (child 15 or younger incapable of donating blood; 16-year-old may do so with parental consent). *Id.* § 321.177 (child 13 or younger cannot drive; 14-year-old eligible for instruction permit only; 16-year-old eligible for intermediate license; 17-year-old eligible for full driver's license); *see also id.* § 321 G.9 (child 15 or younger must be under direct adult supervision to operate snowmobile on public highway). *Id.* § 299.1A (child 15 or younger must attend school). *Id.* § 232.11 (child 15 or younger incompetent to waive right to counsel when questioned by peace officer or probation officer without written parental consent). *Id.* §§ 92.5, 92.6 (child 14 or 15 years old may only be employed in certain occupations); *see also id.* § 92.7 (limiting hours child 15 or younger permitted to work). *Id.* § 633.280 (child 15 or younger incompetent to be attesting witness to will). Iowa Admin. Code rr. 185-4.25, 185-17.5 (child 15 or younger may not sell beer or wine or serve liquor). *Id.* r. 441-109.8 (child 15 or younger may not work in day care center). *Id.* rr. 641-46.5, 875-62.18 (child 15 or younger not permitted to operate tanning bed or kiddie ride at amusement park). *Id.* r. 111-9.2 (child 15 or younger not eligible for enrollment in adult orientation and adjustment center for the blind.)

Laws extending extra protection to young adolescents: Iowa Code Ann. § 702.5 (defining child as person 13 or younger for purpose of criminal code). *Id.* §§ 709.1, 709.8, 709.12 (child 13 or younger protected from sexual contact with older persons).

Id. § 710.5, *amended in nonpertinent part by* 2009 Iowa Legis. Serv. 340 sec. 58 (West) (approved May 21, 2009) (child 13 or younger protected from being enticed away from parent or guardian). *Id.* § 707.2, *amended in nonpertinent part by* 2009 Iowa Legis. Serv. 340 sec. 48 (approved May 21, 2009) (homicide elevated to first-degree murder where victim is child killed while committing child endangerment or assault on child, or under circumstances manifesting extreme indifference to human life). *Id.* § 205.9 (crime to sell any poison to child 15 or younger). *Id.* § 356.16 (child 15 or younger may not be imprisoned at hard labor).

KANSAS

Laws establishing minimum age for rights and responsibilities: Kan. Stat. Ann. §§ 21-3502, 21-3504 (West) (child 15 or younger incapable of consent to sex except with spouse if married). *Id.* § 23-106 (child 14 or younger ineligible for marriage license; 15-year-old only eligible for marriage license with judicial authorization; child 16 or 17 eligible for marriage license only with parental consent). *Id.* § 38-123a (child 15 or younger may not donate blood without parental consent). *Id.* § 65-3223 (child 15 or younger incapable of consenting to donate organs, unless emancipated). *Id.* § 38-123b (child 15 or younger not authorized to consent to hospital, medical, or surgical treatment and procedures without parental consent). 2009 Kan. Sess. Laws 34 sec. 5 (H.B. 2143, approved Mar. 27, 2009) (amending Kan. Stat. Ann.

§ 8-237) (child 16 or younger ineligible for drivers license; children 14 to 16 may apply for instruction permit). Kan. Stat. Ann. §§ 38-601, 38-614 (child 13 or younger may not work, with exceptions for non hazardous work for parents, domestic work, house or yard work, delivery work, agricultural work, or acting; exempt services not to be performed during school hours); *see also id.* § 38-603 (limiting work hours for 14- and 15-year-olds); *id.* § 38-602 (prohibiting child 17 or younger from working in trade injurious to life, health, safety, morals or welfare of the child). *Id.* § 72-1111 (child 17 or younger must attend school).

Laws extending extra protection to young adolescents: Kan. Stat. Ann. § 21-3439 (murder of child 13 or younger in commission of kidnapping with intent to commit sexual offense punishable by death). *Id.* §§ 21-3503 to 21-3505 (children 14 and 15 protected from sodomy, lewd touching, and sexual intercourse). *Id.* §§ 21-3506, 21-3511 (children 13 and younger protected from indecent solicitation and sodomy by enhanced penalties). 2009 Kan. Sess. Laws 70 sec. 1 (H.B. 2098, approved Apr. 8, 2009) (amending Kan. Stat. Ann. § 21-3523) (children 15 and younger protected from electronic solicitation for sexual act). 2009 Kan. Sess. Laws 143 sec. 3 (S.B. 336, approved May, 22, 2009) (amending, eff. July 1, 2009, Kan. Stat. Ann. § 8-1567) (enhancing penalty for driving under influence of alcohol or drugs when child 13 or younger in vehicle). *Id.* § 8-1344 (children 13 and younger protected by requirement that driver properly secure child with seat belt or passenger safety

restraint). *Id.* § 21-3604 (children 15 and younger protected from abandonment). *Id.* § 38-2366 (children 15 and younger convicted and sentenced as adults protected from placement in adult correctional facility).

KENTUCKY

Laws establishing minimum age for rights and responsibilities: Ky. Rev. Stat. Ann. § 510.020 (West) (child 15 or younger incapable of consent to sexual activity). *Id.* § 402.020 (child 15 or younger incapable of contracting for marriage except in case of pregnancy with judicial consent; child 16 or 17 may do so only with parental consent). *Id.* § 227.715 (no sale of fireworks to child 15 or younger). *Id.* § 214.468 (child 15 or younger incapable of donating blood; 16-year-old may do so only with parental consent). *Id.* §§ 186.450, 186.452, 186.454 (child 15 or younger cannot drive; 16-year-old eligible for learner's permit or intermediate license; 17-year-old eligible for full license). *Id.* § 159.010 (child 15 or younger must attend school). *Id.* § 339.220 (child 13 or younger cannot be employed, with exceptions for employment in connection with school-sponsored program); *see also id.* § 339.230 (child 15 or younger may not be employed during regular school hours unless he or she has graduated from high school). *Id.* § 315.136 (child 15 or younger ineligible for registration as pharmacy technician). *Id.* §§ 304.14-070, 304.29-061 (child 14 or younger incapable of contracting for insurance or adult membership fraternal benefit

society). *Id.* § 217.922 (child 13 or younger must be accompanied by a parent or legal guardian when using tanning device). *Id.* § 217.450 (children 14 or younger shall not be sold or given any poisonous medicine without parental consent). *Id.* § 645.030 (child 15 or younger cannot voluntarily admit self to hospital for treatment of mental illness without parental consent).

Laws extending extra protection to young adolescents: Ky. Rev. Stat. Ann. §§ 510.110, 510.120, 510.060, 510.090 (children 15 and younger protected from sexual contact with older persons through various crimes criminalizing such contact). *Id.* §§ 510.050, 510.080 (children 13 and younger protected from sexual contact with older persons through various crimes criminalizing such contact). *Id.* § 509.010 (children 15 and younger protected from kidnapping through provision stating that restraint of such children is "without consent" even where child acquiesces). *Id.* § 454.050 (children 15 and under excluded from courtroom in civil actions for slander, seduction or breach of promise of marriage, unless witnesses in the case or next of kin to party); *see also* Ky. R. Crim. P. 9.50 (children 15 and under may be excluded from courtroom in criminal prosecutions for rape and other sexual offenses, unless witnesses in the case or kin to party).

LOUISIANA

Laws establishing minimum age for rights and responsibilities: La. Rev. Stat. Ann. § 14:80, 14:80.1 (West) (child 16 or younger incapable of consenting to sex with person 17 or older, unless age difference less than 2 years). La. Child. Code Ann. art. 1545 (child 15 or younger may not marry without consent of both parents and judge; child 16 or 17 may not marry without consent of either parents or judge). La. Rev. Stat. Ann. § 51:654 (sale of fireworks to child 14 or younger prohibited). *Id.* § 40:1097 (children 16 and under may not consent to blood donation without consent of parent or guardian). *Id.* § 32:405.1 (child 16 or younger cannot obtain driver's license). *Id.* § 32:402.1 (children 14 or younger cannot participate in any driver education course or driver training program). *Id.* § 23:162 (no child 13 or younger permitted to work, unless specified exceptions are met).

Laws extending extra protection to young adolescents: La. Rev. Stat. Ann. § 14:45 (simple kidnapping defined as intentional taking, enticing or decoying away, for an unlawful purpose, any child 13 or younger without consent of parent or custodian). *Id.* § 14:81.2 (protecting children 16 or younger from molestation by person more than 2 years older). *Id.* § 14:81 (protecting children 16 or younger on the internet by punishing lewd and lascivious acts or electronic transmissions by persons more than 2 years older). *Id.* § 15:469.1 (providing for closed chambers testimony by victim in criminal prosecution

for certain sex offenses where victim is child 15 or younger).

MAINE

Laws establishing minimum age for rights and responsibilities: Me. Rev. Stat. Ann. tit. 17-A, §§ 253, 254 (West) (child 13 or younger incapable of consent to sexual activity except with spouse; child 14 or 15 may consent to activity only with persons less than 5 years older). *Id.* tit. 19-A, § 652 (child 15 or younger incapable of contracting for marriage without parental and judicial consent). *Id.* tit. 22, § 1502-A (child 16 or younger incapable of consenting to give blood). *Id.* § 2944 (child 15 or younger incapable of consent to donate organs, unless emancipated minor); *cf. id.* tit. 15, § 3506-A (child 15 or younger ineligible for emancipation). *Id.* tit. 29-A, § 2323 (child 15 or younger required to wear helmet when riding bicycle). *Id.* §§ 1251, 1256, 1304 (children 14 and younger cannot drive; 15-year-old eligible for learner's permit or restricted license only). *Id.* tit. 20-A, § 5001-A (child 16 or younger must attend school). *Id.* tit. 26, § 775 (child 15 or younger may not be employed without work permit signed by superintendent of school district); *see also id.* §§ 771, 774 (limiting work hours and permissible occupations for children 15 and younger). *Id.* tit. 32, §§ 1231-A, 14226 to 14229 (child 16 or younger ineligible to be registered as electrologist, cosmetologist, barber, esthetician, or manicurist); *see also id.* § 14233 (child 15 or younger ineligible to be licensed as barbering or cosmetology

student). *Id.* tit. 24-A, §§ 2407, 4110 (child 14 or younger incapable of contracting for life insurance or joining fraternal benefit society). *Id.* tit. 18-A, § 9-302 (child 13 or younger may be adopted without his or her consent). *Id.* tit. 12, § 6505-A (child 14 or younger may not fish or take elvers). *Id.* tit. 17, § 319 (children 15 or younger prohibited from playing bingo).

Laws extending extra protection to young adolescents: Me. Rev. Stat. Ann. tit. 17-A, §§ 253, 255-A, 256, 258 to 261 (children 13 and younger protected from sexual contact and other offenses committed by older persons through various crimes criminalizing such contact regardless of consent). *Id.* § 254 (children 14 and 15 protected from sexual abuse by adults). *Id.* § 553 (child 13 or younger protected from abandonment by parent or guardian). *Id.* tit. 22, § 1549 (smoking in vehicle prohibited when child 15 or younger present). *Id.* tit. 15, § 1205 (hearsay statement of child 15 or younger describing sexual contact admissible as evidence in criminal prosecution, if child would be harmed by testifying in open court and statement made in presence of judicial officer and subject to cross-examination). *Id.* tit. 17-A, § 8 (no statute of limitations for certain sex offenses against child 15 or younger).

MARYLAND

Laws establishing minimum age for rights and responsibilities: Md. Code Ann., Crim. Law

§§ 3-307, 3-308 (West) (children 15 and younger cannot consent to sexual activity, except with persons less than 4 years older). Md. Code Ann., Fam. Law § 2-301 (child 14 or younger may not marry; child 16 or 17 may do so with either parental consent or medical certification of pregnancy; child 15 may do so only with parental consent and medical certification of pregnancy). Md. Code Ann., Pub. Safety Law § 10-112 (sale of sparklers or sparkling devices to child 15 or younger prohibited). Md. Code Ann., Health-Gen. Law § 20-101 (child 15 or younger may not donate blood; 16-year-old may do so only with parental consent). Md. Code Ann., Transp. Law § 21-1207.1 (children 15 and under required to wear helmets when riding bicycles). 2009 Md. Laws 184 sec. 1 (eff. Oct. 1, 2009; amending Md. Code, Transp. Law § 16-103) (child younger than 15-years, 9-months cannot drive; child 15-years, 9-months eligible for learner's permit only; child 16-years, 6-months to 18 eligible for provisional license). Md. Code Ann., Educ. § 7-301 (children 15 and younger must attend school). Md. Code Ann., Lab. & Empl. §§ 3-203, 3-209 (child 13 and younger cannot be employed, with exceptions for agricultural work and other limited work); *see also id.* § 3-211 (limiting hours 14- and 15-year olds are permitted to work); *id.* § 3-213 (children 14 or 15 prohibited from working in certain hazardous occupations).

Laws extending extra protection to young adolescents: Md. Code Ann., Crim. Law §§ 3-303, 3-305 (elevating maximum punishments for first degree

rape and first degree sexual offense to life without parole if committed while kidnapping child 15 or younger). *Id.* § 3-304, 3-306, 3-307 (children 13 and younger protected from sexual contact with persons 4 or more years older). *Id.* § 3-503 (children 15 and younger protected from child kidnapping). Md. Code Ann., Transp. Law § 22-412.3 (penalizing driver of car when child 15 or younger does not wear seat belt).

MASSACHUSETTS

Laws establishing minimum age for rights and responsibilities: Mass. Gen. Laws Ann. ch. 265, § 23 (West) (child 15 or younger incapable of consenting to sexual intercourse); *cf. Com. v. Smith,* 728 N.E.2d 272, 276 (Mass. 2000) (noting, despite possible ambiguity in statute, that lack of consent conclusively presumed by law for child of such age). Mass. Gen. Laws Ann. ch. 111, § 184C (child 15 or younger ineligible to donate blood; 16-year-old may not donate blood without parental consent). *Id.* ch. 113, § 8 (child 17 or younger incompetent to make decision to donate organs at death). *Id.* ch. 85, § 11B (child 16 or younger operating bicycle or being carried as passenger must wear helmet). *Id.* ch. 207, §§ 7, 24, 25 (child 17 or younger incapable of contracting for marriage without parental consent and judicial order). *Id.* ch. 90, §§ 8, 8B (child 15 or younger cannot drive; 16-year-old may apply for learner's permit; child 16 and a half but not yet 18 eligible for restricted junior operator's license upon meeting certain requirements). *Id.* 23, § 11H (child 15 and under ineligible to

enter into apprentice agreement). *Id.* ch. 149, § 60 (no person shall employ child age 15 or younger, subject to limited exceptions). *Id.* ch. 176, § 9 (child 14 or younger not to be admitted into fraternal benefit society). *Id.* ch. 111, § 211 (child 13 or younger may only use tanning device when accompanied by parent; children 14 to 17 may not use tanning device without written consent of parent).

Laws extending extra protection to young adolescents: Mass. Gen. Laws Ann. ch. 265 § 13B (enhancing penalties for indecent assault and battery when victim is child 13 or younger). *Id.* § 23 (protecting children 15 and younger from sexual intercourse or abuse). *Id.* § 23A (enhancing penalties for sexual abuse of a child aged 12 to 15 when offender is at least 10 years older). *Id.* § 23A (protecting children 15 and younger from assault with intent to commit rape). *Id.* § 26C (enhancing penalties for kidnapping when victim is child 15 or younger). *Id.* § 26C (protecting children 15 and younger from enticement). *Id.* ch. 90, § 24V (driving while intoxicated with child passenger 14 or younger constitutes child endangerment and grounds for revocation of license). *Id.* ch. 278, § 16D (child 14 or younger who is witness or victim in criminal case protected through provision authorizing child's videotaped testimony if found that child would suffer from trauma by testifying in live court).

MICHIGAN

Laws establishing minimum age for rights and responsibilities: Mich. Comp. Laws Ann. § 750.520d (West) (child 15 or younger incapable of consent to sexual activity). *Id.* §§ 551.51, 551.103 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may not do so without parental consent). *Id.* § 722.41 (child 16 or younger incompetent to consent to donate blood). *Id.* § 333.10104 (child 15 or younger incompetent to make decision to donate organs unless emancipated). *Id.* § 333.13102 (child 17 or younger not permitted to obtain tattoo or body piercing without parental consent). *Id.* § 257.310e (child under 14 years 9 months cannot drive; child 16 or younger eligible only for graduated licenses). *Id.* § 380.1561 (children between 6 and 16 must attend school). *Id.* § 409.103 (child 13 or younger cannot be employed except in limited occupations); *see also id.* § 409.110 (limiting hours child 15 or younger permitted to work). *Id.* §§ 339.1108, 339.1207 (child 16 or younger ineligible to be licensed as barber or cosmetologist). *Id.* § 722.752 (establishing curfew for children 15 and younger). *Id.* § 500.2205 (child 15 or younger incapable of contracting for life insurance). *Id.* § 710.43 (child 13 or younger may be adopted without his or her consent).

Laws extending extra protection to young adolescents: Mich. Comp. Laws Ann. § 750.145a (children 15 and younger protected from immoral enticement and solicitation). *Id.* § 750.350 (children 13 and younger protected from kidnapping).

Id. §§ 750.520b to 750.520e (children 15 and younger but older than 12 protected from sexual contact with older persons through various crimes criminalizing such contact regardless of consent). *Id.* § 257.625 (enhanced penalty for operation of motor vehicle under influence of alcohol or controlled substance when child 15 or younger in car). *Id.* § 600.2163a (child 15 or younger who is victim of abuse or sex crime protected through provision authorizing victim's videotaped deposition to be used for pretrial proceedings, impeachment purposes, sentence determination, or factual basis for a no contest plea or to supplement a guilty plea); *see also id.* (child may use anatomically correct dolls or mannequins to assist in testimony).

MINNESOTA

Laws establishing minimum age for rights and responsibilities: Minn. Stat. Ann. §§ 609.342, 609.343, 609.345 (West) (child who is 13, 14, or 15 incapable of consenting to sexual activity with person more than 48 months older). 2009 Minn. Sess. Law Serv. 129 (S.F. 548, approved May 20, 2009) (amending Minn. Stat. § 517.02) (child 15 or younger incapable of contracting for marriage; child who is 16 or 17 may marry only with parental consent and judicial approval). Minn. Stat. Ann. § 624.20 (child 17 or younger prohibited from purchasing fireworks). *Id.* § 145.41 (child 15 or younger not eligible to donate blood; 16-year-old may donate blood only with parental consent). *Id.* § 525A.04 (child 15 or younger not permitted to donate organ unless child is emancipated;

parent may donate organ on child's behalf). *Id.* § 609.2246 (child 17 or younger not permitted to obtain tattoo without parental consent). *Id.* § 171.05, *amended by* 2009 Minn. Sess. Law Serv. 165 (H.F. 108, approved May 21, 2009) (child 14 or younger may not drive; child who is 15, 16 or 17 eligible for learner's permit). *Id.* § 120A.22, *amended by* 2009 Minn. Sess. Law Serv. 96 (H.F. 2, approved May 16, 2009) (child 15 or younger required to attend school). *Id.* §§ 181A.04 & 181A.07 (child 13 or younger may not work, with limited exceptions for entertainers, newspaper carriers, babysitters, referees for children's sports games and certain agricultural work; child 15 or younger may only work for limited hours, child 17 or younger may not work in hazardous occupation).

Laws extending extra protection to young adolescents: Minn. Stat. Ann. §§ 609.342, 609.343, 609.345 (protecting children who are 13, 14 and 15 from sexual contact with older persons though various crimes criminalizing such contact regardless of consent). *Id.* § 609.352, *amended by* 2009 Minn. Sess. Law Serv. 59 (H. F. 1301, approved May 11, 2009, eff. Aug. 1, 2009) (children 15 and younger protected while using internet by felonies related to use of computer to solicit or communicate for sexual purposes). *Id.* § 169A.03, *amended by* 2009 Minn. Sess. Law Serv. 96 (H.F. 2, approved May 16, 2009) (enhanced penalty for driving while impaired by alcohol when child 15 or younger was in vehicle at time of offense and driver was at least 36 months older than child).

Id. § 169.686, *amended by* 2009 Minn. Sess. Law Serv. 82 (S.F. 99, approved May 15, 2009) (penalizing driver of car when child of driver 14 or younger does not wear seat belt). *Id.* § 609.25 (protecting children 15 and younger from kidnapping through provision requiring parental consent for confinement and removal of child).

MISSISSIPPI

Laws establishing minimum age for rights and responsibilities: Miss. Code. Ann. §§ 97-3-65, 97-3-95 (West) (child 14 or 15 incapable of consent to sexual activity with person, not spouse, 36 months older than child; child 13 or younger incapable of consent to sexual activity with person, not spouse, 24 months older than child). *Id.* § 93-1-5 (female child 14 or younger and male child 16 or younger incapable of obtaining marriage license, with exception for judicial approval). 2009 Miss. Laws 551 sec. 1 (H.B. 150, approved Apr. 17, 2009, eff. July 1, 2009) (amending Miss. Code § 41-41-15) (child 15 or younger incompetent to consent to donate blood; 16-year-old may not donate blood without parental consent; 17-year-old may consent to donate blood notwithstanding parental consent). 2009 Miss. Laws 488 sec. 1 (S.B. 2280, approved Apr. 6, 2009, eff. July 1, 2009) (amending Miss. Code § 63-1-9) (child 14 or younger not permitted to drive; 15-year-old eligible for temporary driving permit; 16-year-old eligible for intermediate license; child 16 years, 6 months may receive driver's license if certain special conditions are met); *cf.*

id. sec. 3 (amending Miss. Code § 63-1-21) (describing limitations on holders of temporary permit or intermediate license). 2009 Miss. Laws 526 sec. 1 (H.B. 525, approved Apr. 13, 2009, eff. July 1, 2009) (amending Miss. Code § 37-13-91) (children 6 to 16 must attend school). Miss. Code Ann. § 71-1-17 (child 13 or younger prohibited from working in mill, cannery, workshop, factory, or manufacturing establishment); *see also id.* § 71-1-21 (child 14 or 15 employed in mill, cannery, workshop, factory, or manufacturing establishment prohibited from working between 7 p.m. and 6 a.m., more than 8 hours per day, or more than 44 hours per week). *Id.* § 73-61-1 (unlawful for any person to place tattoo upon body of child 17 or younger). *Id.* § 43-21-505 (service on child 13 or younger effectuated by making service upon parent, guardian or custodian and guardian ad litem).

Laws extending extra protection to young adolescents: Miss. Code Ann. § 45-33-25 (sexual offender registration not required for offender 13 or younger). *Id.* § 97-3-95 (protecting children 15 and younger from sexual exploitation by older persons and children 17 and younger from sexual exploitation by persons in position of trust or authority over child). *Id.* § 45-33-47 (offender 21 or older, who is convicted of any sex offense where victim was 14 or younger shall be subject to lifetime registration and shall not be relieved of duty to register). *Id.* § 97-5-5 (children 13 and younger protected from enticement for purposes of prostitution, concubinage, or marriage). *Id* § 97-5-41 (children 14 through 17 protected

from sexual acts with step-parent or adopted parent). *Id.* § 13-1-407, 13-1-411 (children 15 and younger protected from emotional trauma when testifying in child abuse case through provision allowing such testimony via videotaped deposition, with accused abuser required to watch through two-way mirror or other screening device, if substantial likelihood shown that child would suffer traumatic emotional or mental distress if required to testify in open court).

MISSOURI

Laws establishing minimum age for rights and responsibilities: Mo. Ann. Stat. § 566.032 (West) (child 13 or younger incapable of consenting to sexual intercourse). *Id.* § 566.034 (child 16 or younger incapable of consenting to sexual intercourse with individual 21 years of age or older). *Id.* § 566.062 (child 13 or younger incapable of consenting to sodomy). *Id.* § 566.064 (child 16 or younger incapable of consenting to sodomy with individual 21 years of age or older). *Id.* § 451.090 (child 14 or younger cannot obtain marriage license without judicial finding of good cause; child 15 to 17 may do so only with parental consent). *Id.* § 320.151 (no sale of fireworks to child 13 or younger unless accompanied by adult). *Id.* § 431.068 (child 15 or younger not eligible to donate blood; 16-year-old requires parental consent). *Id.* § 194.220 (child 15 or younger incapable of making anatomical gift decision). *Id.* § 167.031 (mandatory school attendance for children between ages of 7 and 16; school board in individual districts may

increase compulsory attendance age to 17 by adopting resolution). *Id.* § 324.520 (prohibiting tattooing or body piercing of child 17 or younger without parental consent). *Id.* §§ 302.060, 302.130 (child 14 or younger cannot drive; 15-year-old eligible for temporary instruction permit only). *Id.* § 294.021 (child 13 or younger cannot be employed, with limited exceptions); *see also id.* § 294.040 (child 15 or younger prohibited from being employed in certain hazardous occupations). *Id.* §§ 328.075, 329.050 (child 16 or younger ineligible to be licensed as barber or cosmetologist). *Id.* § 453.030 (child 13 or younger can be adopted without his or her consent).

Laws extending extra protection to young adolescents: Mo. Ann. Stat. § 566.151 (child 14 or younger protected from enticement for purpose of engaging in sexual conduct by persons 21 or older). *Id.* § 573.025 (elevating punishment for promoting child pornography if obscene material portrays child 13 or younger). *Id.* § 565.100 (children 13 and younger incapable of forming consent to activity proscribed by kidnapping statute). *Id.* §§ 565.149, 565.156 (children 16 and younger protected from child abduction). *Id.* § 566.067 (providing enhanced penalty for crime of child molestation involving child 13 or younger). *Id.* § 566.083 (child 14 or younger protected from sexual misconduct). *Id.* § 307.179 (penalizing driver of car when child 15 or younger does not wear seat belt). *Id.* §§ 491.678, 491.680 (child victim 16 or younger protected by provision authorizing admissibility of child's in-camera videotaped deposition in lieu of

live testimony in certain criminal prosecutions). *Id.* § 217.345 (incarcerated children 16 and younger must be kept physically separated from persons 17 and older).

MONTANA

Laws establishing minimum age for rights and responsibilities: Mont. Code Ann. § 45-5-501 (West) (child 15 or younger incapable of consent to sexual activity). *Id.* §§ 40-1-202, 40-1-213 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent and judicial approval). *Id.* § 72-17-201 (child 14 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 41-1-501 (child 15 or younger ineligible for emancipation). *Id.* § 61-5-105 (child 14 or younger cannot receive full driver's license; 13-year-old eligible for restricted license upon showing of hardship). *Id.* § 20-5-102 (children must attend school until 16th birthday or graduation from 8th grade). *Id.* §§ 41-2-104 to 41-2-110 (establishing employment restrictions for minors, with heightened restrictions for children 15 and younger, and further increased restrictions for children 13 and younger).

Laws extending extra protection to young adolescents: Mont. Code Ann. §§ 45-5-502, 45-5-503, 45-5-507 (enhanced penalties for sexual offenses against children 15 or younger, subject to close-in-age exceptions). *Id.* § 45-5-212 (children 13 and younger protected from assault on minor if offender is 18 or

older). *Id.* § 41-5-206 (child 15 or younger may not be incarcerated with adults).

NEBRASKA

Laws establishing minimum age for rights and responsibilities: Neb. Rev. Stat. Ann. § 28-319 (West) (child 12 to 15 incapable of consent to sexual activity with person 19 or older). *Id.* §§ 42-102, 42-105 (child 16 or younger incapable of contracting for marriage; 17-year-old requires parental consent). *Id.* § 71-4808 (child 16 or younger incapable of consenting to donate blood). *Id.* § 71-4802 (child 17 or younger incapable of consenting to donate organs). *Id.* §§ 38-108; 38-10,165 (children 17 and younger cannot obtain body art, defined to include tattoos and body piercings, without parental consent). *Id.* §§ 60-4,118.05 to 60-4,126 (child 13 or younger cannot drive; 14-year-old eligible for learner's permit or school or farm permit only; child 16 or older eligible for provisional license; child 17 or older eligible for driver's license). *Id.* § 79-201 (all children under 18 must attend school, except that child 16 or older may unenroll in school with notarized parental permission); *see also id.* § 79-203 (superintendent of school district may issue permit for employment of child 14 or 15 who has completed 8th grade, where employment necessary for child's own support or support of dependents). *Id.* § 48-310 (child 15 or younger restricted from working certain hours). *Id.* §§ 71-204; 38-1062 (child 16 or younger ineligible to be licensed as

barber, cosmetologist, electrologist, aesthetician, or nail technician).

Laws extending extra protection to young adolescents: Neb. Rev. Stat. Ann. § 28-311 (children 13 and younger protected from criminal child enticement). *Id.* § 28-320.01 (children 14 and younger protected from sexual contact with adults). *Id.* § 28-320.02 (children 16 and younger protected from sexual offenses over internet). *Id.* § 28-311.04 (enhanced penalty for stalking if victim 15 or younger). *Id.* §§ 29-1925, 29-1926 (child victim or witness to any felony protected through provision authorizing videotaped depositions rather than live testimony in criminal prosecution).

NEVADA

Laws establishing minimum age for rights and responsibilities: Nev. Rev. Stat. Ann. § 200.364 (West) (child 15 or younger incapable of consenting to sexual activity with person 18 or older). *Id.* §§ 122.020; 122.025 (child 15 or younger incapable of contracting for marriage except parental consent and judicial authorization, to be given in extraordinary circumstances; child 16 or 17 years old capable of marriage only with parental consent). *Id.* § 460.040 (child 16 or younger not eligible to donate blood without parental consent). *Id.* § 451.556 (child 15 or younger incapable of making anatomical gift decision). *Id.* §§ 483.250, 483.2521 to 483.2529, 483.280 (child under 13 cannot drive; child 15 years,

six months eligible for learner's permit; child 16 or 17 eligible for restricted license only; but child 14 or 15 eligible for restricted license where extenuating circumstances present). *Id.* §§ 392.040, 392.100, 392.110 (child 17 or younger required to attend school, but child 14 or older may be exempted with board of trustees approval). *Id.* § 609.245 (child 13 or younger cannot be employed without permission of district judge, with certain exceptions); *see also id.* §§ 609.190; 609.200; 609.221 (prohibiting children 15 and younger from working in certain occupations); *id.* § 609.240 (limiting hours children 15 and younger permitted to work). *Id.* § 687B.070 (child 15 or younger cannot contract for insurance). Nev. R. Civ. P. 4 (if child 13 or younger is to be served, child's parent or guardian must also be served). Nev. Rev. Stat. Ann. § 127.020 (child 13 or younger can be adopted without his or her consent). *Id.* § 412.026 (child 16 or younger cannot join the Nevada National Guard and is not included in Nevada National Guard Reserve, composed of all able-bodied residents 17 to 64). *Id.* § 475.110 (child 15 or younger not subject to mandatory firefighting duty required of able-bodied males 16 to 50).

Laws extending extra protection to young adolescents: Nev. Rev. Stat. Ann. § 200.366 (enhanced penalty for sexual assault if victim 15 or younger). *Id.* § 200.508 (enhanced penalty for abuse or neglect if victim 13 or younger and harm results from sexual abuse or exploitation). *Id.* § 200.730 (penalty for possession of pornography depicting

children 15 and younger). *Id.* §§ 200.750, 200.710, 200.720 (enhanced penalties and mandatory minimum incarceration for promotion of sexual performance of children 13 and younger). *Id.* § 201.230 (children 13 and younger protected from lewdness). *Id.* § 201.540 (enhanced penalties for teachers who engage in sexual activity with students 15 and younger). *Id.* § 174.227 (child 13 or younger who is witness in criminal prosecution protected through provision authorizing witness's videotaped deposition with judicial consent). *Id.* § 484.3795 (aggravated circumstance in conviction for driving under influence of intoxicating liquor if child 14 or younger in car).

NEW HAMPSHIRE

Laws establishing minimum age for rights and responsibilities: N.H. Rev. Stat. Ann. § 457:4 (West) (male child 13 or younger and female child 12 or younger incapable of contracting for marriage). *Id.* § 571-C:1 (child 15 or younger may not donate blood unless married; child aged 16 may not donate without parental consent, unless married). *Id.* § 265:144 (children 15 and younger must wear helmets when riding bicycles in public roadways). *Id.* §§ 263:16, 263:19, 263:25 (child under 15 and a half may not drive; child 15 and a half or older may drive with licensed driver while being taught to drive; child 16 or 17 may receive license upon meeting instructional requirements). *Id.* § 193:1 (children aged 6 to 17 required to attend school). *Id.* § 276-A:4 (child 15 or younger permitted to work only subject to certain

restrictions). *Id.* § 167:82 (child 15 or younger exempted from employment requirement for welfare assistance program). *Id.* § 179:19 (child 16 or younger prohibited from working as entertainer in cocktail lounge where liquor or beverages are sold). *Id.* § 313-A:24 (child 15 or younger prohibited from apprenticing as barber, esthetician, or cosmetologist). *Id.* § 326-C:5 (child 16 or younger unqualified to obtain license for occupational therapy). *Id.* § 31:43-c (child 15 or younger prohibited from any public street after 9 p.m. unless accompanied by parent or guardian). *Id.* § 418:5 (child 14 or younger ineligible to join fraternal benefit society). *Id.* § 313-A:31 (child 17 or younger prohibited from using tanning salon without parental consent; child 14 or younger prohibited from same without physician's note). *Id.* § 207:2-a (child 15 or younger prohibited from hunting using firearm, bow and arrow, or crossbow and bolt, except when accompanied by properly licensed adult). *Id.* § 270:30 (child 15 or younger may not operate motorized vessel having power in excess of 25 horsepower on public waters unless accompanied by adult). *Id.* § 605:1 (child 16 or younger may not waive right to counsel and plead guilty or go to trial without parental consent). *Id.* § 141-C:18 (child 13 or younger may not be tested for sexually transmitted diseases without knowledge or consent of parent or guardian).

Laws extending extra protection to young adolescents: N.H. Rev. Stat. Ann. §§ 632-A:2 to 632-A:4 (protecting children who are 13, 14 or 15 years

old from sexual activity with older persons). *Id.* § 633:2 (protecting child 15 or younger from being confined and exposed to risk of serious bodily injury without consent of child's parent or guardian). *Id.* § 639:3 (protecting children 15 and younger from being solicited to engage in sexual activity). *Id.* § 645:1 (protecting children age 15 and younger from indecent exposure). *Id.* § 649-A:1 et seq. (protecting children 15 and younger from being used as subjects of sexual visual images). *Id.* § 265-A:3 (enhanced penalty for driving while intoxicated when carrying passenger age 15 or younger). *Id.* § 517:13-a (authorizing use of videotaped testimony of child victim or witness where child was 16 or younger at time of crime). *Id.* § 517:13 (prohibiting discovery deposition of child victim or witness in criminal case where child is 15 or younger). *Id.* § 632-A:8 (in sexual assault prosecution involving child victim age 15 or younger, child's testimony shall be heard in camera unless defendant shows good cause to the contrary). *Id.* § 354-B:2 (where child 16 or younger is civil defendant in civil rights action, special confidentiality provisions apply). *Id.* § 618:6 (children 16 and younger exempt from confinement for nonpayment of fine). *Id.* § 650-C:1 (prohibiting adult from storing firearms where adult knows or should know child age 15 or younger could find them).

NEW JERSEY

Laws establishing minimum age for rights and responsibilities: N.J. Stat. Ann. § 2C:14-2

(West) (child 13 to 15 incapable of consent to sexual activity, except with person within 4 years of own age). *Id.* § 9:17A-6 (child 15 or younger incapable of consenting to donate blood; 16-year-old requires parental consent). *Id.* § 26:6-80 (child incapable of making decision to donate organs unless emancipated or old enough to apply for driver's license); *cf. id.* § 39:3-3 to 39:3-42 (16-year age minimum to apply for restricted license). *Id.* § 39:4-10.1 (child 16 or younger required to wear helmet when riding bicycle). *Id.* §§ 39:3-3 to 39:3-42 (child 15 and younger cannot drive; 16-year-old eligible for learner's permit and restricted license only; 17-year-old eligible for provisional license only); *see also* N.J. Dept. of Motor Vehicles, http://www.state.nj.us/mvc/Licenses/EarlyBird.htm (last visited July 11, 2009). *Id.* § 17B:24-2 (minor 14 or younger not competent to contract for life or health insurance). *Id.* § 26:2D-82.1 (child 13 or younger not permitted to use tanning facility; child 14 to 17 must have parental consent). *Id.* § 18A:38-25 (children 15 and younger must attend school). *Id.* § 2C:40-21 (child 17 or younger may not consent to tattooing or body piercing without parental consent). *Id.* §§ 34:2-21.2; 34:2-21.15; 34:2-21.17; 34:2-21.58 (establishing heightened employment restrictions for children 15 and younger).

Laws extending extra protection to young adolescents: N.J. Stat. Ann. § 2C:13-1 (enhanced penalty for kidnapping if victim 15 or younger). *Id.* § 2C:11-3 (enhanced punishment for murder if victim 13 or younger). *Id.* § 2C:24-4 (protecting children

15 and younger from activity by parent or guardian that endangers their welfare or exposes them to inappropriate sexual conduct). *Id.* (protecting children 15 and younger from exploitation through provision criminalizing production or distribution, including internet distribution, of pornography involving such children). *Id.* § 39:3-76.2f (driver of vehicle responsible for ensuring that passengers 8 to 17 wear seat belts). *Id.* § 2C:40-21 (crime to tattoo or body-pierce child 17 or younger without parental consent). *Id.* § 2A:84A-32.4 (protecting child witness 15 or younger from severe emotional or mental distress through provision authorizing testimony of such child via closed-circuit television in criminal prosecution of certain sex crimes).

NEW MEXICO

Laws establishing minimum age for rights and responsibilities: N.M. Stat. Ann. § 30-9-11 (West) (child 16 or younger incapable of consenting to sex with adult over 19, with exception for marriage). *Id.* §§ 40-1-5, 40-1-06 (child 15 or younger incapable of contracting for marriage except with judicial authorization where couple has child or female is pregnant; child 16 or 17 can marry only with parental consent). *Id.* § 60-2C-8 (sale of fireworks to child 15 or younger prohibited). *Id.* § 24-10-6 (child 16 or younger incapable of donating blood). *Id.* § 24-6B-4 (child 14 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 32A-21-4 (child 15 or younger may not be emancipated). *Id.* § 32A-24-3

(bicycle helmet required for child 17 or younger to operate bicycle, skates, scooter or skateboard). *Id.* § 66-5-5 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit only). *Id.* § 22-12-2 (child 17 or younger must attend school). *Id.* §§ 50-6-1 to 50-6-4, 50-6-17 (child 13 or younger ineligible for employment; 14- or 15-year-old ineligible to work in certain hazardous occupations, may work only limited hours, and must have permit, with exceptions for employment by parent, as actor, or to deliver newspapers). *Id.* §§ 61-17A-8, 61-17A-9 (child 16 or younger ineligible to be licensed as barber or cosmetologist). *Id.* §§ 59A-18-7, 59A-44-6 (child 14 or younger incapable of contracting for insurance or adult membership in fraternal benefit society). N.M. Rules Ann., R. 1-004 (child 14 or younger incompetent to accept service of process for another at their residence). N.M. Stat. Ann. § 32A-6A-15 (child 13 or younger cannot consent to mental health services). *Id.* § 32A-5-17 (child 13 or younger can be adopted without his or her consent).

Laws extending extra protection to young adolescents: N.M. Stat. Ann. §§ 30-6A-4, 30-9-1, 30-37-3.2, 30-37-3.3 (children 15 and younger protected from sexual exploitation by prostitution, enticement for sex acts, and sexual solicitation and communication through an electronic device); *see also id.* §§ 30-9-11, 30-9-13 (establishing additional crimes protecting young adolescents from sexual offenses). *Id.* § 66-7-369 (prohibiting operation of most vehicles unless children 17 and younger wear seat belts). *Id.* § 30-3A-3.1 (enhanced punishment for stalking where victim

15 or younger). *Id.* § 30-9-17 (child 15 or younger who is victim of sex crime may testify by videotaped deposition in criminal prosecution).

NEW YORK

Laws establishing minimum age for rights and responsibilities: N.Y. Penal Law § 130.05 (McKinney) (child 16 or younger incapable of consenting to sexual activity). N.Y. Dom. Rel. Law §§ 15, 15-a (child 13 or younger prohibited from getting married; child who is 14 or 15 may only marry with both parental and judicial consent; 16- or 17-year-old may only marry with parental consent). N.Y. Pub. Health Law § 3123 (child 16 or younger not eligible to donate blood without parental consent). N.Y. Veh. & Traf. Law § 1238 (child 13 or younger must wear helmet when riding bicycle). *Id.* § 1265 (child 13 or younger must wear helmet when riding horse). *Id.* § 502 (child 15 or younger not eligible for driver's license; child of 16 eligible for junior license only; child of 17 only eligible for license after successful completion of approved driver education course). N.Y. Educ. Law § 3205 (children between ages of 6 and 16 must attend school). N.Y. Lab. Law § 142 (restricting working hours for children age 14 and 15); *see also id.* § 143 (restricting, to lesser extent, working hours of children age 16 and 17); *cf.* N.Y. Educ. Law § 3226 (limited farm work permit available for children 12 years old or older). N.Y. Lab. Law § 133 (children 15 and younger may not be employed painting or cleaning the exterior of

buildings, in any occupation in connection with factory, in any job involving dangerous machinery, or in any job related to mental hygiene). N.Y. Gen. Bus. Law § 434 (child 17 and younger not eligible to apply for barber's license). *Id.* § 406 (child 16 or younger not eligible for license in nail specialty, waxing, natural hair styling, esthetics or cosmetology). N.Y. Educ. Law §§ 6608-b, 6609 (child 16 or younger not qualified to be certified dental assistant or dental hygienist). *Id.* § 6906 (child 16 or younger not eligible for license as practical nurse). N.Y. Envtl. Conserv. Law § 13-0311 (child 16 or younger who wishes to apply for shellfish digger's permit must obtain signed consent from parent or legal guardian). *Id.* § 13-0328 (child 15 and younger not eligible for commercial food fish license). N.Y. Ins. Law § 4507 (child 14 or younger "at nearest birthday" not eligible for adult membership in fraternal benefit society). *Id.* § 3207 (child younger than 14 years, 6 months not eligible to contract for life insurance). N.Y. C.P.L.R. 309 (child 13 or younger not entitled to receive service of process in civil action involving child). N.Y. Pub. Health Law § 3555 (child 13 or younger not permitted to use ultraviolet radiation at tanning facility; child 14, 15, 16 or 17 may only use facility with parental consent). N.Y. Nav. Law § 49 (child 13 or younger may not operate personal watercraft). N.Y. Envtl. Conserv. Law § 6811 (child 13 or younger ineligible for any license which authorizes hunting of big game; child 15 or younger ineligible for certain other hunting licenses). N.Y. C.P.L.R. 4508 (child 15 or younger not entitled to same confidentiality protections as adult

when speaking to social worker; if social worker obtains information from child indicating child has been victim of crime, social worker may be required to testify regarding said information). N.Y. Gen. Bus. Law § 396-k (toy may not be sold or distributed for use by children 13 or younger if, when subjected to reasonably foreseeable damage or abuse, toy could present electrical, mechanical or thermal hazard). N.Y. Penal Law § 265.05 (child 15 or younger may not possess air-gun). N.Y. Dom. Rel. Law § 111 (child 13 or younger may be adopted without child's consent). N.Y. Mental Hyg. Law § 9.13 (patient who is 15 or younger may not apply for voluntary admission to hospital for mental health treatment; child's parent, guardian or next-of-kin may apply for admission on child's behalf). N.Y. Parks Rec. & Hist. Preserv. Law § 25.19 (restrictions on use of snowmobiles by children 13 and younger and by children 14-17). N.Y. Mil. Law § 2 (male children 16 and younger excluded from militia). N.Y. Unconsol. Law § 8921 (child 15 or younger may not attend professional boxing or wrestling match unless accompanied by parent or guardian).

Laws extending extra protection to young adolescents: N.Y. Penal Law § 130.30 (protecting children 14 and younger from sexual intercourse with adults). *Id.* § 130.60 (protecting children 13 and younger from sexual contact with adults). *Id.* §§ 100.05, 100.08, 100.13, 105.05, 105.10, 105.13, 105.17 (protecting children 15 and younger from being drawn into criminal conduct by adults and/or

from participation in criminal conspiracies with adults). *Id.* §§ 115.00, 115.01, 115.08 (providing enhanced penalties for adult who helps child 15 or younger commit crime). *Id.* § 120.70 (protecting children 16 and younger from being lured into motor vehicles, watercraft, aircraft, buildings or isolated areas for the purposes of committing certain crimes against children). *Id.* § 220.74 (enhanced penalty for manufacture of methamphetamine if offense committed in presence of child age 15 or younger and offender is at least 5 years older than child). *Id.* § 230.05 (enhanced penalty for adult who exploits child prostitute 13 or younger). N.Y. Crim. Proc. Law §§ 65.00, 65.10 (child 14 or younger may testify via closed-circuit television under some circumstances). *Id.* § 60.44 (child 15 or younger may use anatomically correct doll in testifying in criminal proceedings related to sexual offenses). N.Y. Envtl. Conserv. Law § 9-1111 (power of state officials to impress any person for fire fighting assistance not applicable to children 15 and younger). N.Y. Veh. & Traf. Law § 1229-c (driver of motor vehicle responsible for ensuring children 15 and younger are using safety belts or other child restraint devices). N.Y. Crim. Proc. Law § 510.15 (child 15 or younger may not be jailed with adults without approval of state division of youth).

NORTH CAROLINA

Laws establishing minimum age for rights and responsibilities: N.C. Gen. Stat. Ann. § 14-27.7A

(West) (child 13, 14, or 15 incapable of consent to sexual activity with person 4 or more years older, with exception for marriage). *Id.* §§ 51-2, 51-2.1 (child 13 or younger incapable of contracting for marriage; 14- or 15-year-old can marry only under particular situations and with judicial consent; 16- or 17-year-old may not marry without parental consent). *Id.* § 14-410 (child 15 or younger cannot purchase fireworks). *Id.* § 130A-412.31 (child 15 or younger incapable of donating blood without parental consent). *Id.* § 130A-412.6 (child 15 or younger incapable of making decision to donate organs unless emancipated). *Id.* § 20-171.9 (child 15 or younger required to wear helmet when riding bicycle). *Id.* § 14-400 (child 17 or younger not permitted to obtain tattoo; parental consent required for body piercing). *Id.* § 20-11 (child 14 or younger cannot drive, 15-year-old eligible for learner's permit only). *Id.* § 115C-378 (children between 7 and 16 must attend school). *Id.* § 95-25.5 (child 13 or younger cannot be employed except in newspaper distribution; limited hours for child 15 or younger in any employment).

Laws extending extra protection to young adolescents: N.C. Gen. Stat. Ann. § 14-178 (enhanced penalty for incest if victim 15 or younger and offender at least 6 years older). *Id.* §§ 14-50.17, 14-50.18 (enhanced penalty for solicitation of gang activity if person solicited 15 or younger). *Id.* § 14-190.7 (children 15 and younger protected from distribution of obscene materials). *Id.* § 90-95

(enhanced penalty for selling controlled substance to child 15 or younger).

NORTH DAKOTA

Laws establishing minimum age for rights and responsibilities: N.D. Cent. Code § 12.1-20-03 (child under 15 unable to consent to sexual activity). *Id.* § 14-03-02 (child 15 or younger prohibited from entering into marriage contract; children 16 or 17 may not marry without parental consent). *Id.* § 23-15.1-05 (child 13 or younger prohibited from purchasing fireworks). *Id.* § 23-06.6-03 (child 13 or younger incompetent to make decision to donate organs, unless emancipated). *Id.* § 39-06-03 (child 13 or younger prohibited from operating motor vehicle; child aged 14 or 15 may operate a motor vehicle with learner's permit when accompanied by adult aged 18 or more). *Id.* § 15.1-20-01 (compulsory education between 7 and 16). *Id.* § 34-07-01 (child 13 or younger may not be employed in any occupation except farm labor, domestic service, or by a family member, and not during school hours); *see also id.* § 34-07-15 (child aged 14 or 15 may not be employed before 7 a.m. nor after the hour of 7 p.m., except that these hours are 7 a.m. to 9 p.m. during summer months, nor more than 18 hours during school weeks, nor more than 3 hours on schooldays, nor more than 40 hours during non-school weeks, nor more than 8 hours on non-schoolday). *Id.* § 43-04-23 (child 16 or younger ineligible to be registered as apprentice barber). *Id.* § 14-10-17 (child 13 or younger cannot consent to drug,

alcohol, or sexually-transmitted-disease treatment, without parental consent). *Id.* § 20.1-04-07 (child 14 or younger prohibited from holding spring wild turkey license).

Laws extending extra protection to young adolescents: N.D. Cent. Code § 12.1-20-03 (enhanced penalties for those who engage children 14 or younger in sexual acts). *Id.* § 12.1-18-04 (children 13 and younger protected from kidnapping through provision stating that restraint is "without consent" even if child acquiesces, unless parent or guardian has given consent). *Id.* § 12.1-20-03.1 (children 14 and younger protected from continuous sexual abuse). *Id.* § 12.1-20-05 (children 14 and younger protected from corruption and solicitation). *Id.* § 12.1-20-05.1 (enhanced penalties for those who lure child 14 or younger by electronic means). *Id.* § 39-21-41.2 (child 17 and under must be restrained in moving vehicle). *Id.* § 12-46-13 (child 15 and younger cannot be incarcerated with adults).

OHIO

Laws establishing minimum age for rights and responsibilities: Ohio Rev. Code Ann. § 2907.04 (West) (child 15 or younger incapable of consent to sexual activity with person 18 or older). *Id.* § 3101.01 (male child 17 or younger and female child 15 or younger incapable of contracting for marriage without parental consent). 2009 Ohio Laws 5 (H.B. 67, approved July 7, 2009, eff. Oct. 6, 2009)

(amending Ohio Rev. Code § 2108.31) (child 15 or younger not authorized to donate blood; 16-year-old may not donate blood without parental consent). Ohio Rev. Code Ann. § 2108.04 (child under 15-½ prohibited from making anatomical gift decision unless emancipated). *Id.* § 3730.06 (child 17 or younger incapable of receiving tattoo or piercing without parental consent and presence). *Id.* §§ 4507.071, 4507.05 (children under 15-½ cannot drive; children under 16 eligible for temporary instruction permit only). *Id.* § 3321.01 (child 17 and younger must attend school). *Id.* § 4109.07 (establishing time limits on employment of minors 15 and under, and less strict time limits for minors 16 and 17).

Laws extending extra protection to young adolescents: Ohio Rev. Code Ann. § 2907.21 (enhanced penalty for compelling prostitution if person compelled is less than 16). *Id.* § 2905.05 (protecting children 13 and younger from criminal child enticement). *Id.* § 5120.16 (child 17 or younger cannot be incarcerated with inmates over 18; exception if child does not follow rules and regulations; if department receives too few inmates under 18 to fill separate housing unit, child may be housed in unit with inmates under 21).

OKLAHOMA

Laws establishing minimum age for rights and responsibilities: Okla. Stat. Ann. tit. 21, § 1111 (West) (child 15 or younger incapable of consent to

sexual activity). *Id.* tit. 43, § 3 (child 15 or younger incapable of contracting for marriage, except with judicial authorization in settlement of suit for seduction or paternity or if unmarried female is pregnant or has given birth to an illegitimate child; 16- and 17-year-old child may do so only with parental consent). *Id.* tit. 63, § 2152 (child 16 or younger incapable of donating blood). 2009 Okla. Sess. Law Serv. 139 sec. 4 (West) (S.B. 622, approved May 8, 2009, eff. Nov. 1, 2009) (creating Okla. Stat. tit. 63, § 2200.4A) (child 15 or younger incompetent to make decision to donate organs, unless emancipated). 2009 Okla. Sess. Law Serv. 319 sec. 1 (S.B. 844, approved May 26, 2009, eff. July 1, 2009) (amending Okla. Stat. tit. 21, § 842.1) (child 17 or younger incapable of receiving tattoo; child 17 or younger incapable of receiving body piercing without parental consent and presence). 2009 Okla. Sess. Law Serv. 99 sec. 1 (H.B. 1599, approved Apr. 24, 2009, eff. Nov. 1, 2009) (amending Okla. Stat. tit. 47 § 6-105) (child under 15-½ cannot drive; child under 16 eligible for learner permit only). Okla. Stat. tit. 70, § 10-105 (child 17 or younger must attend school). *Id.* tit. 40, §§ 71-76 (child 15 or younger prohibited from employment in hazardous occupations and working certain hours).

Laws extending extra protection to young adolescents: 2009 Okla. Sess. Law Serv. 234 sec. 125 (H.B. 2029, approved May 21, 2009) (amending Okla. Stat. § 1123) (children 15 and younger protected from sexual contact, electronically communicated indecent

proposals, and enticement). Okla. Stat. Ann. tit. 21, § 1114 (children 14 and younger protected from sexual penetration by persons 18 and older). *Id.* § 1040.13a (children 17 and younger protected while using the internet and other electronic devices by felonies relating to use of computers and electronic devices to engage in sexual communication). *Id.* § 1119 (children 14 and younger protected from abduction for marriage or crime involving moral turpitude). *Id.* § 891 (children 15 and younger protected from enticement). *Id.* § 853 (children 14 and younger protected from abandonment). *Id.* tit. 10, § 1628 (children 15 and younger protected by provision requiring immediate investigation upon report of missing child).

OREGON

Laws establishing minimum age for rights and responsibilities: Or. Rev. Stat. Ann. § 163.315 (West) (child 17 or younger incapable of consenting to sexual activity). *Id.* § 106.010 (child 16 or younger incapable of entering contract for marriage). *Id.* § 166.480 (child 13 or younger prohibited from buying explosives). *Id.* § 109.670 (child 15 or younger not eligible to donate blood without parental consent). *Id.* § 97.955 (unemancipated child 14 or younger not able to consent to anatomical gift; parent or guardian may consent to anatomical gift on child's behalf). *Id.* § 814.485 (child 15 or younger must wear protective headgear when riding bicycle on highway or premises open to public). *Id.* §§ 807.060, 807.065,

807.220, 807.230, 807.280 (child 14 or younger may not drive motor vehicles with limited exceptions for emergencies and children with no other means of transportation to and from school; 15-year-old child eligible for learner's permit only; child who is 16 or 17 eligible for learner's permit or provisional license only). *Id.* § 339.010 (child between ages 7 and 18 must attend school unless child has completed 12th grade). *Id.* § 653.315, *amended by* 2009 Or. Laws 104 (H.B. 2826, approved May 21, 2009) (restricting work hours for children 15 and younger). *Id.* § 653.320 (child 13 or younger may not be employed when school is in session, or in any factory, workshop, mercantile establishment, store, business office, restaurant, bakery, hotel or apartment house). *Id.* § 419B.851 (child 14 or younger cannot accept service of process for another at child's residence). *Id.* § 109.305 (child 13 or younger may be adopted without child's consent). *Id.* § 419B.558 (child 15 or younger may not be emancipated from parents). *Id.* § 660.126 (child 15 or younger may not work as apprentice). *Id.* § 814.600 (child 15 or younger must wear protective headgear when riding skateboard, scooter or using inline skates on highway or premises open to public). *Id.* § 830.088 (child 12 to 15 years old may only operate motorboat if child obtains boating safety certificate; if boat has engine of 10 horsepower or greater, child must also be accompanied by older person).

Laws extending extra protection to young adolescents: Or. Rev. Stat. Ann. § 163.385 (protecting

children 15 and younger from sodomy). *Id.* § 163.395 (enhanced penalty for sodomy of child 13 or younger). *Id.* §§ 163.355 & 163.415, *amended by* 2009 Or. Laws 616 (H.B. 2478, approved June 26, 2009) (enhanced penalty for sexual activity with child 15 or younger as compared to sexual activity with child who is 16 or 17). *Id.* § 163.365 (enhanced penalty for sexual activity with child 13 or younger). *Id.* § 161.725 (when determining sentence for repeat offender, judge may not consider offenses committed when defendant was 15 years old or younger). *Id.* § 163.427 (enhanced penalty for sexual abuse of child 13 or younger). *Id.* § 811.210, *amended by* 2009 Or. Laws 498 (S.B. 579, approved June 24, 2009) (penalties for adult who fails to ensure proper safety belt use by child 15 or younger). *Id.* § 137.705 (child 15 or younger who is charged as adult may not be detained in jail with adult offenders).

PENNSYLVANIA

Laws establishing minimum age for rights and responsibilities: 18 Pa. Cons. Stat. Ann. § 3122.1 (West) (child 15 or younger incapable of consent to sexual activity with person four or more years older who is not spouse). 23 Pa. Cons. Stat. Ann. § 1304 (child 15 or younger incapable of contracting for marriage without judicial consent; children age 16 and 17 cannot marry without parental consent). 35 Pa. Stat. Ann. § 10002 (child 15 or younger cannot donate blood; 16-year-old must have parental consent). 20 Pa. Cons. Stat. Ann. § 8611

(child 15 or younger incompetent to make decision to donate organs; 16- and 17-year-old children must have signed parental consent). 18 Pa. Cons. Stat. Ann. § 6311 (child 17 or younger cannot be tattooed or get body piercing without parental consent and presence). 75 Pa. Cons. Stat. Ann. § 1503 (child 15 or younger cannot drive; 16-year-old eligible for restricted license only). 24 Pa. Stat. Ann. § 13-1326 (child 16 and younger must attend school). 43 Pa. Cons. Stat. Ann. § 42 (children 15 or younger prohibited from working with limited exceptions; in any case no child 13 or younger may work). 35 Pa. Stat. Ann. § 10101.1 (child 13 and younger cannot receive outpatient mental health treatment without parental consent). 34 Pa. Cons. Stat. Ann. § 2901 (child 15 or younger prohibited from receiving falconry permit). 53 Pa. Stat. Ann. § 15322 (child 15 or younger cannot be plumber's apprentice). 63 Pa. Stat. Ann. §§ 510, 553 (child 15 or younger cannot receive cosmetology or barber license). 53 Pa. Stat. Ann. § 4740 (child 15 or younger cannot attend public dance after 9 p.m.).

Laws extending extra protection to young adolescents: 18 Pa. Cons. Stat. Ann. § 3127 (enhanced penalty for indecent exposure if child 15 or younger present). 42 Pa. Cons. Stat. Ann. § 9718 (enhanced penalty for aggravated assault, rape, involuntary deviate sexual intercourse, and aggravated indecent assault when victim 15 or younger). 75 Pa. Cons. Stat. Ann. § 4581 (child 17 or younger required to wear seatbelt in car). 42 Pa. Cons. Stat. Ann.

§§ 5982, 5984.1 (child victim or witness 15 or younger protected through provision authorizing recorded testimony).

RHODE ISLAND

Laws establishing minimum age for rights and responsibilities: R.I. Gen. Laws Ann. § 11-37-6 (West) (defining age of consent as 16; child 15 or younger incapable of consent to sexual activity with person over 18). *Id.* § 15-2-11 (male 17 or younger or female 15 or younger can receive marriage license only with parental consent and after investigation by family court; female 16 or 17 eligible for marriage license with parental consent only). *Id.* § 11-13-3 (child 14 or younger may not buy cartridges, ammunition, gun, or pistol without parental consent). *Id.* § 23-4.5-1 (child 16 or younger may not consent to donate blood without parental permission). *Id.* § 23-18.6.1-4 (child 15 or younger incompetent to consent to donate organs, unless emancipated). *Id.* § 31-19-2.1 (child 15 or younger required to wear helmet when riding bicycle or using skateboard, roller skates, inline skates, or scooter). *Id.* § 27-25-6 (no child 14 or younger may be adult member of fraternal benefit society). *Id.* § 31-10-6 (child 15 or younger may not drive; under graduated license scheme, children aged 16 to 18 may gradually acquire full driving privileges). *Id.* § 16-19-1 (child aged 6 to 16 must attend school). *Id.* § 11-9-11 (cities or town may designate curfew streets on which children 15 or younger are prohibited from loitering after 9 p.m.). *Id.* § 28-3-3

(child 13 or younger prohibited from employment, child 14 or over may obtain special limited permit to work, not during school hours and not in factories); *see also id.* § 28-3-11 (no child 15 or younger to work more than 40 hours per week; no child 17 or younger to work more than 48 hours per week). *Id.* § 28-45-9 (child 15 or younger may not enter apprenticeship program).

Laws extending extra protection to young adolescents: R.I. Gen. Laws Ann. §§ 11-23-1, 11-37-8.1 to 11-37-8.3 (elevating murder to first-degree when committed during any degree of child molestation against child 14 or younger). *Id.* § 11-26-1.4 (penalizing adult who kidnaps child 15 or younger with intent to secretly confine or sexually assault child). *Id.* § 11-26-1.5 (crime to entice, with felonious intent, child 15 or younger to leave child's home or to enter a car or a secluded area). *Id.* § 11-37-8.1 (enhancing punishment for sexual penetration of 14 years or under). *Id.* § 11-37-13.2 (protecting children from unreasonable mental or emotional harm by providing that court may allow victim of sexual crime who is 17 or younger at time of trial to testify in criminal prosecution via videotaped deposition or closed-circuit television, and by establishing rebuttable presumption that child 14 or younger is unable to testify without unreasonable mental or emotional harm). *Id.* § 14-1-26 (child shall not be transferred to or from juvenile correctional facility with adult offenders).

SOUTH CAROLINA

Laws establishing minimum age for rights and responsibilities: S.C. Code Ann. §§ 16-3-651, 16-15-342, 16-3-655 (West) (child 15 or younger incapable of consenting to sexual activity with older partner). *Id.* § 20-1-100 (child 15 or younger may not marry under any circumstances). *Id.* § 23-35-120 (sale of fireworks to child 13 or younger prohibited unless child accompanied by parent). 2009 S.C. Acts 4 sec. 1 (eff. May 6, 2009; amending S.C. Code § 44-43-20) (child 15 or younger prohibited from donating blood; 16-year-old may only donate blood with parental consent). *Id.* sec. 2 (child 15 or younger may not consent to donate his or her organs; child's parent may consent to anatomical gift on child's behalf). S.C. Code Ann. §§ 56-1-40, 56-1-175 (child 14 or younger cannot drive; child who is 15 is eligible for beginner's permit or conditional license only); *see also id.* § 56-1-1720 (child 13 or younger ineligible for moped license). *Id.* § 59-65-10 (child 17 or younger must attend school). S.C. Code Ann. Regs. § 71-3103 (child 15 or younger subject to child labor laws). *Id.* § 71-3106 (child 14 or 15 prohibited from working more than three hours per day while school in session and barred from working in, *inter alia,* manufacturing, mining, warehousing and storage, transportation, construction, baking). S.C. Code Ann. § 7-13-110 (child 15 or younger ineligible to work as poll manager's assistant during elections). *Id.* § 50-5-325 (child 15 or younger barred from serving as master of commercial fishing trawler). *Id.* § 25-3-40 (child 16

or under may not serve in South Carolina State Guard). *Id.* § 40-7-230 (child 16 or younger may not become licensed barber; child 15 or younger may not be licensed barber's assistant or apprentice). *Id.* § 38-38-110 (child 14 or younger not eligible for adult membership in fraternal benefit society). S.C. R. Civ. P. 4 (to serve process on child 13 or younger, process must be served on both child and child's guardian, parent, or other qualified adult). S.C. Code Ann. § 52-19-90 (child 15 or younger may not bungee jump without parental consent). *Id.* § 44-43-710 (child 15 or younger incompetent to consent to autopsy of deceased relative). *Id.* § 44-52-20 (child 15 or younger may not voluntarily admit herself to treatment facility for drug or alcohol dependence; child's parent or legal guardian may apply for admission on child's behalf).

Laws extending extra protection to young adolescents: S.C. Code Ann. § 16-3-655 (special protections against sexual battery for children between ages 11 and 14). *Id.* § 16-15-140 (children 15 and younger protected from lewd or lascivious acts). *Id.* § 16-15-342 (for crimes involving children 15 and younger, consent is no defense to a charge of criminal solicitation). *Id.* § 56-5-2947 (enhanced penalty for failure to stop vehicle when signaled by law-enforcement officer or for operating vehicle while under influence of alcohol or drugs when child 15 or younger in vehicle). *Id.* § 56-5-6520 (penalizing driver of car when child 17 or younger does not wear seat belt, unless child has driver's license or learner's

permit). *Id.* § 44-53-577 (protecting children 16 and younger from being lured or enticed into participating in the sale of narcotics). *Id.* § 56-5-3900 (unlawful to transport child 14 or younger in open area of pickup truck or trailer unless special requirements are met). S.C. Const. Art. XII, § 3 (child 16 or younger may not be incarcerated with adult offenders); S.C. Code Ann. § 63-19-1440 (same).

SOUTH DAKOTA

Laws establishing minimum age for rights and responsibilities: S.D. Codified Laws §§ 22-22-7, 22-22-7.3 (West) (child 15 or younger incapable of consent to sexual activity with person not spouse). *Id.* § 25-1-9 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may only do so with parental consent). *Id.* § 26-2-7 (child 15 or younger incapable of donating blood; 16-year-old requires parental consent). *Id.* § 34-26-51 (child 13 or younger incompetent to make decision to donate organs unless emancipated; parental consent required for unemancipated minor 14 or older). *Id.* § 32-12-11 (child 13 or younger cannot drive; 14-year-old eligible for permit). *Id.* § 13-27-1 (children 6 to 17 must attend school). *Id.* § 60-12-2 (child 13 or younger cannot be employed in factory, workshop or mine during school hours); *see also id.* § 60-12-3 (child 15 or younger cannot be employed in dangerous occupations).

Laws extending extra protection to young adolescents: S.D. Codified Laws § 22-22-7 (children 15 and younger protected from sexual contact with older persons). *Id.* §§ 22-24A-4, 22-24A-5 (children 15 and younger protected from solicitation for sexual acts by persons over 18, including use of computer in furtherance of such solicitation). *Id.* § 22-19-7.1 (children 15 and younger protected from enticement for illegal purposes). *Id.* § 23A-12-9 (child 15 or younger who is victim of sex crime protected through provision authorizing use of victim's videotaped deposition in criminal prosecution where judge finds that in-court testimony would be substantially detrimental to child victim's well-being). *Id.* § 32-37-1.3 (children 14 to 17 required to wear seat belts). *Id.* § 22-19-1.1 (children 13 or younger protected from kidnapping).

TENNESSEE

Laws establishing minimum age for rights and responsibilities: Tenn. Code Ann. §§ 36-3-105, 36-3-106, 36-3-107 (West) (child 15 or younger ineligible for marriage license unless judge or county mayor issues waiver; 16- and 17-year-olds may not marry without parental consent). *Id.* § 68-104-112 (child 15 or younger incapable of purchasing fireworks). *Id.* § 68-32-101 (child 15 or younger incapable of donating blood; 16-year-old requires parental consent). *Id.* § 68-30-104 (child 14 or younger incapable of making decision to donate organs unless emancipated minor). *Id.* § 55-52-105 (child 15 or younger required to wear helmet when riding

bicycle). *Id.* § 62-38-211 (child 17 or younger may not be tattooed; 16- and 17-year-olds eligible for tattooing only to cover existing tattoo and with parental consent and presence). *Id.* § 68-117-104 (child 17 or younger must have parental consent to use tanning salon). *Id.* § 62-38-305 (child 17 or younger ineligible for body piercing without parental consent). *Id.* § 39-13-506 (child 17 or younger incapable of consent to sexual activity except with person less than four years older than child). *Id.* §§ 55-50-311, 55-50-312 (child 13 or younger cannot drive; 14-year-old eligible for only special restricted license, and only if hardship can be shown; 15-year-old eligible for learner's permit). *Id.* § 49-6-3001 (children between 6 and 17 must attend school). *Id.* § 39-17-1702 (children 16 and younger have curfew of 10 p.m. on weekdays, 11 p.m. on weekends; 17-year-olds have curfew of 11 p.m on weekdays, 12 a.m. on weekends). *Id.* §§ 50-5-103, 50-5-107 (child 13 or younger cannot be employed, with exceptions for employment in agriculture, by parent in non-hazardous occupation, or entertainment); *see also id.* § 50-5-104 (limiting hours for 14- and 15-year-olds).

Laws extending extra protection to young adolescents: Tenn. Code Ann. § 39-13-506 (children 13 to 17 protected from sexual contact with older persons). *Id.* § 39-13-529 (children 17 and younger protected while using internet and electronic communication by creation of felony for solicitation of child using computer or electronic communication).

Id. § 24-7-120 (children 13 and younger who are victims of sexual offenses or witnesses in criminal cases protected through provision authorizing such children to testify in criminal prosecution via closed-circuit testimony rather than in open court). *Id.* § 55-9-602 (children 13 to 15 protected by requirement that driver of motor vehicle secure children with seat belts). *Id.* § 37-1-134 (children 15 and younger convicted of crimes protected from incarceration with adults).

TEXAS

Laws establishing minimum age for rights and responsibilities: Tex. Penal Code Ann. § 21.11 (Vernon), *amended by* 2009 Tex. Sess. Law. Serv. 260 (H.B. 549, approved May 30, 2009, eff. Sept. 1, 2009) (child 16 or younger incapable of consenting to sexual activity). 2009 Tex. Sess. Law Serv. 978 (H.B. 3666, approved June 19, 2009, eff. Sept. 1, 2009) (amending Tex. Fam. Code Ann. § 2.009) (child 15 or younger ineligible for marriage license without court order; child 16 or 17 may obtain marriage license only with parental consent, documents establishing that a prior marriage of the applicant has been dissolved, or a court order). Tex. Occ. Code Ann. § 2154.252 (child 15 or younger not permitted to purchase fireworks). Tex. Health & Safety Code Ann. § 162.015 (child 16 or younger not eligible to donate blood). 2009 Tex. Sess. Law Serv. 186 (H.B. 2027, approved May 29, 2009, effe. Sept. 1, 2009) (amending Tex. Health & Safety Code Ann. § 692.004) (child 15 or younger incapable

of making anatomical gift decision; child 16 or 17 must obtain parental consent). Tex. Health & Safety Code Ann. § 146.012 (child 17 or younger not permitted to get tattoo without parental consent). Tex. Transp. Code Ann. §§ 521.201, 521.222 (child 14 or younger not eligible for driver's license or instruction permit; child 17 or younger must comply with certain requirements). Tex. Educ. Code Ann. § 25.085 (children aged 6 to 17 required to attend school). Tex. Lab. Code Ann. §§ 51.011, 51.003 (child 13 or younger cannot be employed, with exceptions for non-hazardous work, newspaper delivery, and certain agricultural work). *Id.* § 51.013 (children aged 14 and 15 only permitted to work limited hours).

Laws extending extra protection to young adolescents: Tex. Penal Code Ann. § 21.02 (protecting children 13 or younger from continuous sexual abuse). *Id.* § 22.011, *amended by* 2009 Tex. Sess. Law Serv. 260 (H.B. 549, approved May 30, 2009, eff. Sept. 1, 2009) (children 16 and younger protected from sexual assault). *Id.* § 49.045 (enhanced penalty for driving while intoxicated when child 14 or younger in car). Tex. Transp. Code Ann. § 545.413 (penalizing driver of car when child 16 or younger does not wear seat belt). Tex. Penal Code Ann. § 22.041 (children 14 and younger protected from abandonment and endangerment). *Id.* § 22.04, *amended by* 2009 Tex. Sess. Law. Serv. 284 (S.B. 643, approved June 11, 2009) (children 14 and younger protected from serious bodily injury, serious mental impairment or injury, bodily injury, or exploitation by creation of felonies).

Id. § 33.021 (protecting children 16 or younger from sexually explicit communication through electronic communication service).

UNITED STATES (FEDERAL)

Laws establishing minimum age for rights and responsibilities: 10 U.S.C. § 505 (Uniform Code Military Justice) (child 16 or younger prohibited from enlisting in Army, Navy, Air Force, Marine Corps, or Coast Guard; 17-year-old may not do so without written consent of parent or guardian, if such person is entitled to child's custody and control). *Id.* § 311 (children 16 and younger excluded from mandatory unorganized militia consisting of able-bodied males 17 to 45 and females who are members of National Guard). *Id.* §§ 4346, 6958, 9346 (child 16 or younger ineligible for admission to United States Military Academy, United States Naval Academy, or United States Air Force Academy). 29 U.S.C. §§ 203, 212, 213 (regulating child labor and distinguishing between teens younger than 16 and teens 16 or 17 years old); *see also* 41 U.S.C. § 35 (contractor with United States or District of Columbia for value exceeding $10,000 shall not employ male child 15 or younger or female child 17 or younger in manufacture or production or furnishing of any materials, supplies, articles, or equipment included in contract); 16 U.S.C. § 1725 (child 16 or younger ineligible for employment as resource assistant in any Federal land managing agency). 8 U.S.C. § 1182 (children 15 and younger not subject to prohibition of visas and admission to

United States for aliens affiliated with Communist or totalitarian party, because membership involuntary). *Id.* § 1202 (child 13 or younger not required to submit to in-person interview with consular office for non-immigrant visa). *Id.* § 1302 (alien child 13 or younger not responsible for applying for registration and fingerprinting within thirty days of entry; parent or guardian is responsible for such registration for alien child 13 or younger). 16 U.S.C. § 6802 (child 15 or younger not required to pay entrance fee for federal recreational lands and waters).

Laws extending extra protection to young adolescents: 10 U.S.C. § 920 (Uniform Code Military Justice) (child 15 or younger incapable of consent to sexual activity); 18 U.S.C. § 879 (penalizing threats made against children 15 and younger of former United States President). *Id.* § 3056 (Secret Service authorized to protect children 15 and younger of former United States President; period not to exceed 10 years). *Id.* § 1591 (enhanced penalty for sex trafficking of children if child victim 13 or younger). *Id.* § 2442 (protecting children 14 and younger from recruitment as child soldiers by punishing recruitment, enlistment, or conscription of such children into an armed force or group, or use of such children to participate actively in hostilities). U.S. Sentencing Guidelines Manual § 3B1.4 ("Using a Minor To Commit a Crime") (2008) (adding 2 offense levels to guidelines calculation where defendant used or attempted to use child 17 or younger to commit offense or avoid detection). *Id.* § 2A2.3 (adding 4 offense levels to

guidelines calculation for conviction of certain assault offenses where victim is child 15 or younger). 18 U.S.C. § 2241 (providing enhanced punishment for aggravated sexual abuse in prison or other location subject to federal jurisdiction where victim 15 or younger); *see also* U.S. Sentencing Guidelines Manual § 2A3.1 (2008) (adding 2 offense levels to guidelines calculation for conviction of criminal sexual abuse under 18 U.S.C. §§ 2241-2242 where victim is child between 12 and 15). 18 U.S.C. §§ 2251-2260A (ch. 110) (protecting children generally against child pornography and other related sexual exploitation through laws penalizing, *inter alia,* production, distribution, internet distribution, sale, and possession of child sexually explicit materials involving children); *see also, e.g.,* U.S. Sentencing Guidelines Manual § 2G2.1 (2008) (adding 2 offense levels to guidelines calculation for convictions relating to sexual exploitation of minors and production of sexually explicit materials involving minors under 18 U.S.C. §§ 1591, 2251, or 2260(b), where victim is child between 12 and 15).

UTAH

Laws establishing minimum age for rights and responsibilities: Utah Code Ann. §§ 76-5-401, 76-5-401.2 (West) (child 15 or younger incapable of consenting to sex; child 16 or 17 incapable of consenting to sex with person 10 or more years older than child). *Id.* §§ 30-1-8, 30-1-9 (child 15 or younger may not marry unless child and parent obtain judicial court authorization; child 16 or 17 requires parental

consent). *Id.* § 26-28-104 (child 14 or younger cannot consent to organ donation, unless emancipated); *id.* § 78A-6-803 (child 15 or younger not eligible for emancipation). *Id.* §§ 41-8-2, 53-3-204, 53-3-210.5 (child 15 or younger may not be licensed to drive, except 15-year-old may obtain learner's permit; child 16 or younger may not drive after midnight). *Id.* § 34-23-202 (child 15 or younger may not work during schools hours or for more than 4 hours on a school day); *see also id.* § 34-23-201 (child 17 or younger cannot work in hazardous occupation unless under close supervision in apprentice or vocational training program with approval of Labor Division).

Laws extending extra protection to young adolescents: Utah Code Ann. § 76-5-202 (murder of child 13 or younger eligible for capital punishment). *Id.* § 76-3-203.9 (creating aggravating factor in sentencing and parole considerations for violent crimes committed in presence of children 13 and younger). *Id.* §§ 76-5-402.1, 76-5-402.3, 76-5-403.1, 76-5-404.1 (children 13 and younger protected from sexual contact through various crimes criminalizing such contact). *Id.* § 76-5-301.1 (children 13 and younger protected by law punishing confinement, seizure, detention, or transport of such child by any means without parental consent as kidnapping). *Id.* § 76-9-702.7 (enhancing culpability for voyeurism or distribution of images obtained through voyeurism where victim 13 or younger). Utah R. Crim. P. 15.5 (child 13 or younger who is victim of a sex crime protected through provision authorizing victim's recorded

statement or deposition or closed-circuit testimony in criminal prosecution for sexual offense). Utah Code Ann. § 41-6a-503 (enhanced penalty for driving under influence of alcohol or drugs when child 15 or younger in car). *Id.* § 41-6a-1803 (children 15 and younger protected by provision requiring driver to ensure children wear seat belts).

VERMONT

Laws establishing minimum age for rights and responsibilities: Vt. Stat. Ann. tit. 13, § 3252 (West) (child 14 or younger incapable of consenting to sex; 15-year-old cannot consent to sex with person 19 or older). 2009 Vt. Laws 3 sec. 8 (enacted by legis. override, Apr. 7, 2009; eff. Sept. 1, 2009; amending Vt. Stat. tit. 18, § 5142) (child 15 or younger may not receive marriage license; 16- and 17-year-old may do so only with parental consent). Vt. Stat. Ann. tit. 18, § 9 (children 16 and younger cannot consent to donate blood without parental authorization). *Id.* tit. 23, § 606, 607, 617 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit; 16- and 17-year-olds eligible for limited junior license). *Id.* tit. 16, § 1121 (children ages 6 to 16 must attend school). *Id.* tit. 21, §§ 431, 434 (child 15 or younger ineligible to work when school in session without filing certificate of eligibility from commissioner, and may work only during limited hours). *Id.* tit. 24, § 2151 (municipalities may create curfews for children 15 and younger). *Id.* tit. 8, §§ 3710, 4470 (child 14 or younger may not contract for insurance or be admitted to

fraternal benefit society). *Id.* tit. 10, § 4254 (child 15 or younger eligible for hunting and archery license only with written consent of parent/guardian). *Id.* tit. 7, § 1002 (child 15 or younger prohibited from selling tobacco).

Laws extending extra protections to young adolescents: Vt. Stat. Ann. tit. 12, § 1612 (various health professionals required to disclose information indicating a patient 15 or younger has been victim of a crime). *Id.* tit. 13, § 1063 (crime of stalking aggravated if victim 15 or younger). *Id.* § 1460 (general public excluded from hearings in hate crime matters where defendant 15 or younger). *Id.* § 2828 (crime to lure child 15 or younger into sexual act by any means). *Id.* §§ 2821, 2822, 2824, 2827 (children 15 and younger protected from various forms of sexual exploitation). *Id.* § 4007 (penalty for person other than parent or guardian or firearms instructor who sells or furnishes firearms to child 15 or younger). *Id.* tit. 15, § 512 (parent or guardian of child who married at age 15 or younger may seek annulment).

VIRGINIA

Laws establishing minimum age for rights and responsibilities: Va. Code Ann. §§ 18.2-63, 18.2-371 (West) (child 14 or younger incapable of consent to sexual activity; child who is 15, 16 or 17 incapable of consent to sexual activity with adults). *Id.* §§ 20-48, 20-49 (child 15 or younger may not get

married unless one of parties seeking to be married is pregnant or has recently given birth; child who is 16 or 17 and has not been previously married may not marry without parental consent). *Id.* §§ 32.1-291.4, 16.1-331 (child 15 and a half or younger may not consent to donate organs after death unless emancipated); *cf. id.* § 16.1-331 (child under 16 not eligible for emancipation). *Id.* § 18.2-371.3 (child 17 or younger may not be tattooed or undergo body piercing except in presence of child's parent or guardian or when done under supervision of medical doctor). *Id.* §§ 46.2-334, 46.2-335 (child younger than 15 years and 6 months may not drive; child who is at least 15 years and 6 months but younger than 16 years and 3 months may obtain learner's permit only; child who is at least 16 years and 3 months but younger than 18 may obtain license subject to special conditions). 2009 Va. Legis. Serv. 795 (West) (H.B. 2008, approved Apr. 8, 2009) (amending Va. Code §§ 46.2-908.1, 46.2-914) (child 13 or younger prohibited from driving motorized skateboard or scooter unless under immediate supervision of adult; child 15 or younger may not operate moped on roadway). Va. Code Ann. § 22.1-254 (compulsory schooling for children older than 5 and younger than 18). *Id.* §§ 40.1-78, 40.1-79.01 (child 13 or younger may not be employed, with limited exceptions; child 14 or 15 may not be employed during school hours except in connection with educational training program); *see also id.* § 40.1-80.1 (limiting work hours for children 15 and younger); 2009 Va. Legis. Serv. 218 (H.B. 2495, approved Mar. 27, 2009) (amending Va. Code § 40.1-100) (children 17 and

younger may not work in variety of professions, including meat packing, slaughtering animals, roofing, operating power-driven baking machines, operating power-drive paper products machines, or job involving driving at night; children 15 and younger barred, except as part of approved training program, from wide array of professions including work in any dance studio, carnival, pool hall, outdoor fair, as aid or orderly in hospital or nursing home, in service of veterinarian treating horses or farm animals, in funeral home, providing room service in hotel or motel, as theater usher, or as lifeguard).

Laws extending extra protection to young adolescents: Va. Code Ann. § 18.2-31 (murder of child 13 or younger subject to capital punishment where offender is 21 or older). *Id.* §§ 18.2-63, 18.2-67.4:2 (protecting children aged 13 and 14 from sexual activity with adults and older children). *Id.* § 18.2-67.3 (enhanced penalties for sexual battery where victim is 13 or 14 years old and act accomplished by force, will or intimidation; or where victim is between 13 and 17 and offense is committed by parent, step-parent, grandparent or step-grandparent). *Id.* § 18.2-370 (protecting children aged 15, 16 and 17 from sexual abuse by adults, with enhanced penalties when offender is parent, step-parent, grandparent or step-grandparent). *Id.* § 18.2-374.1 (enhancing penalties for child pornography when victim is 14 or younger). *Id.* § 18.2-371 (protecting children ages 15, 16 and 17 from consensual sexual activity with adults); *see also id.* (misdemeanor

for person 18 or older to contribute to delinquency of person 17 or younger, contribute to abuse or neglect of child, or place child in need of supervision or services). *Id.* § 18.2-374.3 (enhancing penalties for improper solicitation of minor over the internet or via other electronic communications systems when victim is child 14 or younger). *Id.* § 18.2-67.9 (where child witness or victim in certain criminal cases is 14 or younger, court may order that child testify via closed-circuit television when child refuses to testify in open court, is substantially unable to communicate, or would suffer severe emotional trauma from testifying in open court). 2009 Va. Legis. Serv. 229 (H.B. 1693, approved Mar. 27, 2009) (amending Va. Code § 18.2-270) (enhanced penalty for driving while intoxicated with a child 17 or younger in the car). Va. Code Ann. § 46.2-1095 (driver of car must ensure that child 15 or younger wears seat belt).

WASHINGTON

Laws establishing minimum age for rights and responsibilities: Wash. Rev. Code Ann. §§ 9A.44.030, 9A.44.079 (West) (child 15 or younger incapable of consenting to sexual activity outside of marriage with person 4 or more years older). *Id.* § 26.04.010 (child 16 or younger cannot marry absent showing of necessity and judicial approval). *Id.* § 70.01.020 (child 17 or younger incapable of donating blood without parental consent). *Id.* § 70.77.515 (illegal to sell fireworks to child 15 or younger). *Id.* § 68.64.030 (child younger than 15 and

a half incompetent to make decision to donate organ without parental consent unless child is emancipated minor). *Id.* § 26.28.085 (misdemeanor to tattoo child 17 or younger). *Id.* § 46.20.055 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit); *see also id.* § 46.20.500 (child 15 or younger may not operate electric-assisted bicycle). *Id.* § 28A.225.010 (child 17 or younger must attend school). *Id.* § 26.28.060 (child 13 or younger prohibited from working without permit from judge, with exceptions for employment in agriculture or for parent).

Laws extending extra protection to young adolescents: Wash. Rev. Code Ann. §§ 9A.44.076, 9A.44.079, 9A.44.086, 9A.44.089 (West) (children 15 and younger but older than 11 protected from sexual contact with older persons through various crimes criminalizing such contact). *Id.* § 46.61.5055 (enhanced penalty for driving while intoxicated when child 15 or younger in car). *Id.* § 46.61.688 (no person may operate motor vehicle unless all children 15 and younger wearing seat belts). *Id.* § 9A.88.010 (gross misdemeanor to expose oneself in presence of child 13 or younger). *Id.* § 9A.32.055 (crime to cause death to children 15 and younger under circumstances manifesting an extreme indifference to human life when perpetrator has history of assaulting or torturing that child). *Id.* § 46.61.685 (unlawful to leave child age 15 or younger unattended inside running car). *Id.* § 72.01.410 (when child 17 or younger sentenced to adult correctional facility, secretary of

corrections may transfer child to juvenile correctional facility until age 21; if child is housed in adult correctional facility, child must be kept in housing separated from adult offenders until eighteenth birthday; limited exception under which child may be kept in administrative segregation unit which also houses adult offenders, but within unit, child must be kept physically separated from adult offenders).

WEST VIRGINIA

Laws establishing minimum age for rights and responsibilities: W. Va. Code Ann. § 61-8B-5 (West) (child 15 or younger incapable of consent to sexual activity with person over 16 and 4 years older, except spouse). *Id.* § 48-2-301 (child 15 or younger incapable of consenting to marriage without judicial and parental consent; 16- and 17-year-olds require only parental consent). *Id.* § 16-21-1 (child 15 or younger incapable of donating blood; 16-year-old requires parental consent). *Id.* § 16-19-4 (child 15 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 49-7-27 (child 15 or younger ineligible for emancipation). *Id.* § 17C-11 A-4 (child 14 or younger required to wear helmet when riding bicycle). *Id.* § 33-6-4 (minor 14 or younger incapable of contracting for life or accident insurance). *Id.* §§ 17B-2-3 to 17B-2-3a (applying graduated licensing system in which child 14 or younger cannot drive, 15-year-old is eligible for instruction permit only, and 16- and 17-year-olds are eligible for restricted intermediate license only).

Id. § 18-8-1a (child 15 or younger must attend school). *Id.* §§ 21-6-1, 21-6-7 (child 13 or younger prohibited from most employment with some exceptions; child 15 or younger may work only limited hours).

Laws extending extra protection to young adolescents: W. Va. Code Ann. § 61-2-9b (enhanced penalty for assault of child 16 or younger and near school). *Id.* § 61-2-14 (punishing kidnapping or concealment of child 15 or younger). *Id.* § 61-2-14f (enhanced culpability for abduction of child 16 or younger near school). *Id.* §§ 62-6B-2; 62-6B-3 (child 13 or younger who is victim of sex crime protected through provision authorizing child's testimony in criminal prosecution through live, two-way closed-circuit television rather than in open court). *Id.* § 49-5-16 (no child 17 or younger, including one transferred and convicted in adult court, shall be incarcerated in adult prison).

WISCONSIN

Laws establishing minimum age for rights and responsibilities: Wis. Stat. Ann. § 765.02 (West) (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent). *Id.* §§ 948.01, 948.02, 948.09 (child 16 or younger may not consent to sexual intercourse, except 16-year-old may do so with spouse). *Id.* § 146.33 (child 15 or younger incapable consenting to donate blood; 16-year-old requires parental consent). *Id.* § 157.06 (child under 15-½ years of age

incapable of making decision to donate organs, unless emancipated). *Id.* §§ 948.01, 948.70 (child, defined as person 16 or younger, may not be tattooed, except by physician for medical reasons). *Id.* §§ 343.06, 343.07, 343.08 (child under 15-½ years of age cannot drive; child under 16 may not hold license, except that child 14 to 17 may apply for restricted license in certain limited circumstances); *see also* Wis. Dept. Transp., Graduated Driver License, http://www.dot.wisconsin.gov/drivers/teens/ (explaining requirements and restrictions of graduated licensing system for teens). *Id.* § 118.15 (children 6 to 18 must attend school). *Id.* § 103.67 (child 13 and younger may not be employed except in agricultural work and certain other limited exceptions).

Laws extending extra protection to young adolescents: Wis. Stat. Ann. §§ 948.02, 948.09 (sexual contact or intercourse with a child 15 or younger is felonious sexual assault; sexual intercourse with child 16 or 17 is misdemeanor). *Id.* § 948.075 (children 15 and younger protected while using internet by creation of felony relating to the use of computers to facilitate a child sex crime). *Id.* §§ 948.01, 948.70 (crime to tattoo or offer tattoo to child 16 or younger). *Id.* § 346.65 (increasing penalties for various offenses related to reckless and drunken driving when a child 15 or younger in the car at time of violation). *Id.* § 967.04 (in criminal prosecution or certain other proceedings, child witness 15 or younger may testify by recorded deposition rather than in open court, if judge finds that this is necessary to protect interests

of child). *Id.* § 302.18 (children 14 and younger protected from incarceration with adults).

WYOMING

Laws establishing minimum age for rights and responsibilities: Wyo. Stat. Ann. § 6-2-316 (West) (child 15 or younger incapable of consent to sexual contact with person 17 or older, unless age gap is less than four years). *Id.* § 20-1-102 (child 15 or younger cannot contract for marriage unless approved by a judge and parental consent is given). *Id.* § 35-5-204 (child 15 or younger incapable of consenting to organ donation, unless emancipated minor). *Id.* §§ 31-7-108, 31-7-110, 31-7-117 (child 13 or younger cannot drive; 14-year-old eligible for learner's permit or restricted license; minimum age 16 for unrestricted license). *Id.* § 21-4-102 (children 15 and younger are required to attend school). *Id.* § 27-6-107 (child 13 or younger cannot be employed, with exceptions of farm, domestic, or lawn and yard service); *see also id.* § 27-6-110 (limiting work hours for children 15 and younger); *id.* § 27-6-112 (prohibiting children 15 and younger from working in certain dangerous occupations); *id.* § 27-6-114 (prohibiting employment of children 15 and younger in immoral or dangerous ways). *Id.* § 33-7-209 (child 16 or younger ineligible to be licensed as barber). *Id.* §§ 26-15-105, 26-29-206 (child 14 or younger incapable of contracting for life insurance or adult membership in fraternal benefit society). Wyo. R. Civ. P. 4, Wyo. R. Crim. P. 9, Wyo. R. App. P. 14.01

(child 13 or younger incapable of accepting service for another; if person to be served is 13 or younger, child's guardian must be served). *Id.* § 1-22-109 (child 13 or younger can be adopted without his or her consent). *Id.* § 14-1-203 (child 16 or younger ineligible to become emancipated minor). *Id.* § 19-8-102 (child 16 or younger ineligible to serve in state militia). *Id.* § 23-2-107 (child 13 or younger may not be issued wild bison license).

Laws extending extra protection to young adolescents: Wyo. Stat. §§ 6-2-314 to 6-2-318; (establishing various crimes protecting young adolescents from sexual contact or abuse by older persons). *Id.* § 31-5-233 (enhanced penalty for driving under influence of intoxicating liquor by adult with child 15 or younger in car). *Id.* § 6-2-201 (children 13 and younger protected from kidnapping through provision stating that a person is guilty of the crime if they confine child 13 or younger without consent of parent or guardian).

RESPONDENT'S BRIEF

(18)

Supreme Court, U.S.
FILED
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No. 08-7621

In the Supreme Court of the United States

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the District Court of Appeal, First District of Florida

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Joe Sullivan is serving a sentence of life imprisonment without the possibility of parole for a non-homicide offense committed when he was thirteen years old. Nationwide, only one other thirteen-year-old child has received a life-without-parole sentence for a non-homicide. The questions presented are:

1. Does imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide violate the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children?

2. Given the rarity of a life imprisonment without parole sentence imposed on a 13-year-old child for a non-homicide and the unavailability of substantive review in any other federal court, should this Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

3. May this Court review Sullivan's Eighth Amendment claim when the state court dismissed his post-conviction motion on an independent and adequate state law ground? (Restated)

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, respondent states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 8

ARGUMENT 12

I. The Trial Court's Ruling – that Sullivan's Post-conviction Motion was Procedurally Barred – is Based on an Independent and Adequate State Law Ground That Forecloses Review in This Court 12

A. The trial court's ruling rests on a state law ground that is independent of the federal question and adequate to support the judgment. 13

B. State courts should not be compelled to adjudicate claims of new constitutional rights in post-conviction proceedings 16

C. This case presents no basis for upsetting long-established state post-conviction procedures because Sullivan's federal constitutional claim could have been asserted at trial and on direct appeal 18

II. Sullivan Entirely Ignores This Court's Eighth Amendment Proportionality Jurisprudence, Which Supports a Life Sentence Without Parole For The Violent Crime Of Sexual Battery 20

A. Under this Court's precedents, no inference of gross disproportionality exists for the violent crime of sexual battery. 22

B. Neither comparative jurisdictional analysis nor Sullivan's "objective indicia" support a constitutional violation 25

III. *Roper* Does Not Alter Proportionality Principles as Applied to Juvenile Incarceration or Compel a Categorical Rule Against Life Sentences Without Parole 37

A. Death is different: *Roper* does not eliminate lengthy sentences, including life sentences, for violent offenses 38

B. Age, as a characteristic of the offender, is already woven deeply into the fabric of state criminal justice systems 41

C. *Roper* does not displace state sentencing laws, which must be flexible to allow for the mix of punishment, deterrence, avoidance of recidivism, and rehabilitation that best address serious crime problems ... 44

D. The categorical rule suggested by Sullivan is ill-defined and unworkable. 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma,
470 U.S. 68 (1985) 14, 15, 17

Albernaz v. U. S.,
450 U.S. 333 (1981) 31

Anders v. California,
386 U.S. 738 (1967) 6

Atkins v. Virginia,
536 U.S. 304 (2002) 35, 37, 40

Barr v. City of Columbia,
378 U.S. 146 (1964) 14

Calderon v. Schribner,
2009 WL 89279 (E.D. Cal. Jan. 12, 2009) 30, 39

Caldwell v. Mississippi,
472 U.S. 320 (1985) 14, 39

Cobos v. Dennison,
825 N.Y.S.2d 332 (N.Y. App. Div. 2006) 40

Coker v. Georgia,
433 U.S. 584 (1977) 23-24

Coleman v. Thompson,
501 U.S. 722 (1991) 13, 17, 19

Ewing v. California,
538 U.S. 11 (2003) 23, 24, 45

Ford v. Wainwright,
477 U.S. 399 (1986) 39

Furman v. Georgia,
408 U.S. 238 (1972) 38

Graham v. State,
982 So. 2d 43 (Fla. Dist. Ct. App. 2008) 8

Harmelin v. Michigan,
501 U.S 957 ..... *passim*

Harris v. Reed,
489 U.S. 255 (1989) 13, 14

Hathorn v. Lovorn,
457 U.S. 255 (1982) 14

Hawkins v. Hargett,
200 F.3d 1279 (10th Cir. 1999) 30

Henry v. State,
342 S.E.2d 499 (Ga. App. 1986) 28

Herrera v. Collins,
506 U.S. 390 (1993) 20

Hutto v. Davis,
454 U.S. 370 (1982) 22, 24

In re Gault,
387 U.S. 1 (1967) 48

In re Nunez,
93 Cal. Rptr. 242 (Cal. Ct. App. 2009) 40

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926 So. 2d 1262 (Fla. 2006) 1, 8

Jackson v. State,
Case No. 10-07-00089-CR, 2008 Tex. App. LEXIS 698 30

Johnson v. Mississippi,
486 U.S. 578 (1988) 14

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128 S. Ct. 2641 (2008) 23, 39, 40

Lockyer v. Andrade,
538 U.S. 63 (2003) 21, 23, 47

Michigan v. Long,
463 U.S. 1032 (1983) 17

Miller v. State,
846 A.2d 238 (Del. 2004) 28

Ohio v. Reiner,
537 U.S. 17 (2001) 15

People v. Lemons,
562 N.W.2d 447 (Mich. 1997) 28

Phipps v. State,
385 A.2d 90 (Md. Ct. Spec. App. 1978) 28

Pinson v. Morris,
830 F.2d 896 (8th Cir. 1987) 24

Posters "N" Things, Ltd. v. United States,
511 U.S. 513 (1994) 12

Roberson v. Fla. Parole & Probation Comm'n,
444 So. 2d 917 (Fla. 1983) 45, 49

Roper v. Simmons,
543 U.S. 551 (2005) ..... *passim*

Rummel v. Estelle,
445 U.S. 263 (1980) 22, 24, 39, 45

Smith v. State,
691 S.W.2d 154 (Ark. 1985) 28

Solem v. Helm,
463 U.S. 277 (1983) 23, 46

Stanford v. Kentucky,
492 U.S. 361 (1989) 19, 46, 48

State v. Cross,
978 P.2d 227 (Idaho 1999) 28

State v. Foley,
456 So. 2d 979 (La. 1984) 28

State v. Green,
502 S.E.2d 819 (N.C. 1998) 28, 30

State v. Ira,
43 P.3d 359 (N.M. 2002) 30

State v. Ninham,
767 N.W.2d 326 (Wisc. Ct. App. 2009) 39-40

State v. Smiley,
689 N.W.2d 427 (S.D. 2004) 29

State v. Standard,
569 S.E.2d 325 (S.C. 2002) 30

State v. Warren,
887 N.E.2d 1145 (Ohio 2008) 30

State v. Woodall,
385 S.E.2d 253 (W. Va. 1989) 29

Sullivan v. State,
580 So. 2d 755 (table) (Fla. Dist. Ct. App. 1991) 7

Sullivan v. State,
583 So. 2d 1037 (table) (Fla. 1991) 7

Sullivan v. State,
987 So. 2d 83 (Fla. Dist. Ct. App. 2008) 7-8

Teague v. Lane,
489 U.S. 288 (1999) 13

Thompson v. Oklahoma,
487 U.S. 815 (1988) ..... *passim*

Trop v. Dulles,
356 U.S. 86 (1958) 37

United States v. Feemster,
483 F.3d 583 (8th Cir. 2007) 39

United States v. Int'l Bus. Machs.,
517 U.S. 843 (1996) 12

United States v. Mejia-Orosco,
867 F.2d 216 (5th Cir. 1989) 49

United States v. Weaver,
920 F.2d 1570 (11th Cir. 1991) 49

Wahl v. State,
460 So. 2d 579 (Fla. Dist. Ct. App. 1984) 12

STATUTES AND RULES

28 U.S.C. § 1257(a) 1

Fla. Stat. § 39.02 (1989) 26

Fla. Stat. § 39.02(5)(c)1 (1989) 5

Fla. Stat. § 39.04 (1989) 26

Fla. Stat. § 775.082(8)(d) 31

Fla. Stat. § 787.01 26

Fla. Stat. § 812.13 26

Fla. Stat. § 812.133 26

Fla. Stat. § 817.568(10) 26

Fla. Stat. § 893.135 26

Fla. Stat. § 921.002(1)(g) (2003) 31

Fla. Stat. § 985.227(1) (2003) 31

Fla. Stat. § 985.227(2) (2003) 31

Fla. Stat. § 985.233(1)(b) 31

Fla. Stat. § 985.556 (2009) 26

Fla. Stat. § 985.557 (2009) 26

Fla. Stat. § 985.56 (2009) 5, 26

Fla. Stat. § 985.565(4) (2009) 26

Florida Rule of Criminal Procedure 3.850(b) .....*passim*

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OPINIONS BELOW

The June 17, 2008 decision of the First District Court of Appeal of Florida is reported at 987 So. 2d 83 (table). [JA 73] The First District's August 6, 2008 denial of rehearing, rehearing en banc, and certification to the Florida Supreme Court, is unreported. [JA 74] The order and judgment of the Circuit Court of Florida for the First Judicial Circuit is unreported. [JA 54-72]

JURISDICTION

Under Florida law, the Florida Supreme Court is without jurisdiction to review the First District's decision because it was a per curiam affirmance without written opinion. *See Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006). This Court granted the petition for writ of certiorari on May 4, 2009. Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) is addressed in Section I of the argument, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be permitted, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

Florida Rule of Criminal Procedure 3.850(b) provides:

> **(b) Time Limitations.** A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that
>
> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, or
>
> (3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.

INTRODUCTION

This Court granted review on two questions, one that Sullivan has revised and one that he has ignored entirely. Regarding the latter, Sullivan has ignored the fundamental question of whether jurisdiction exists. Given that an adequate state law basis exists for the trial court's ruling below, and given that Sullivan could have made the same Eighth Amendment claim now raised in his direct appeal in 1990 under the reasoning of *Thompson v. Oklahoma*, 487 U.S. 815 (1988), his claim is procedurally barred and jurisdiction is lacking.

Regarding the former, the initial question presented, upon which review was granted, was based on Sullivan's statement that only two juvenile offenders are serving life sentences for non-homicide crimes committed at age thirteen, and that his "freakishly rare" sentence reflects a "national consensus" against life without parole for such offenders. Now, in his merits brief, Sullivan has revised not only the Question Presented to impliedly include homicides, but also increased the number of juveniles upwards to nine who committed serious offenses such as rape and homicides at age thirteen, and added in 64 more for those age fourteen, reflecting the total of 73 set forth in the only question that Sullivan now addresses.

That the data continue to evolve is understandable. Beyond the many difficulties with obtaining reliable data on juvenile sentences nationwide, even more serious problems exist with interpreting and attempting to make meaningful comparisons with available data. The fact that all reports upon which Sullivan relies have not been

subject to independent verification or review and were self-generated by those opposed to life sentences for juveniles, raises significant questions of accuracy and reliability that cannot be fully explored, let alone resolved, in this forum.

All these shortcomings aside, Sullivan entirely fails to address this Court's narrow proportionality analysis as it applies to his life sentence for sexual battery. He makes no attempt to show his sentence is grossly disproportionate under this Court's non-capital Eighth Amendment precedents. Rather, his sole argument is that *Roper* applies and necessarily dictates that his life sentence be deemed unconstitutional. For the reasons discussed below, Sullivan's sentence is neither grossly disproportionate to his crime nor unconstitutional under the Eighth Amendment's narrow proportionality principle.

STATEMENT OF THE CASE

Joe Sullivan, who had a lengthy juvenile record, was convicted by a jury in 1989 of brutally raping and robbing a 72-year-old woman in her home in Escambia County, Florida. The jury found him guilty of five counts: two counts of sexual battery, two counts of burglary of a dwelling, and one count of grand theft. [Tr. II 250-51][1] Because a grand jury had

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[1] Citations to the trial transcript in Sullivan's direct appeal will appear as [Tr.* _], where "*" is the volume number and "__" is the page number. The transcript was part of the state court record in the 1990 appeal, but does not appear in the record in this case. Respondent is therefore proposing that it be lodged with this Court under Rule 32, Rules of the Supreme Court of the United States.

indicted Graham on the sexual battery counts,[2] he was tried and sentenced as an adult. [Tr. I 5-8; Tr. III 270-73]

On May 4, 1989, Sullivan and two other youths broke into the elderly victim's home to steal her valuables, taking jewelry and coins during the first burglary while she was away. [Tr. I 137-139] Later that same day, Sullivan and an accomplice returned when the victim was home. [Tr. I 165-166] While his accomplice distracted her, Sullivan entered through another door, threw a black slip over her head and threatened to kill her. [Tr. I 76-77] Sullivan then took her to her bedroom, where he removed her clothes and brutally beat and raped her both vaginally and orally. [Tr. I 77-82] The elderly woman sustained bruising, a laceration to the vulva, and a vaginal tear that required surgery as a result of the rape. [Tr. I 81-82, 107, 109]

At trial, the victim identified Sullivan from a voice exemplar. [Tr. I 88, 91] In addition, a neighbor testified that she saw Sullivan and his accomplice on the porch and tried to call the victim before calling the police. [Tr. I 51-56] The first police officer on the scene, Officer Dusty Cutler, also testified that she saw Sullivan run from the victim's home at the time of the rape. [Tr. I 117, 119] Sullivan's accomplice further testified that Sullivan had told him that he had beaten and raped the elderly woman. [Tr. I 167-68, 170] The police investigation discovered Sullivan's

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[2] Florida law provided, and continues to provide, that a juvenile who is indicted by a grand jury for a crime punishable by a life sentence is treated as an adult. *See* Fla. Stat. § 39.02(5)(c)1 (1989); *see* Fla. Stat. § 985.56 (2009).

palm print on a plaque found on the victim's bed. [Tr. I 184-85]

Based on the evidence, the jury convicted Sullivan. [Tr. II 250-51] His sentencing hearing was held on December 12, 1989. [Tr. III 266-78] The state highlighted Sullivan's extensive record, including prior offenses of burglary where Sullivan had killed a dog and a prior assault on one of his counselors. [Tr. III 269-270, 271] The presentence reports indicated that Sullivan had committed seventeen criminal offenses in the two years prior to the rape, including several serious felonies. [Tr. III 268-270] He had failed to adjust to juvenile detention and had assaulted other juveniles while in a commitment facility. As a result, he scored 846 points under Florida's sentencing guidelines, well over the 583 points needed to impose a life sentence. [Tr. III 269 (state attorney noting that "It's not even close.")]

The trial judge concluded that an adult sentence was appropriate and sentenced Sullivan to life in prison on the sexual battery counts and thirty-year sentences on the burglaries. [Tr. III 270-273] The judge concluded that "[t]he juvenile system has been utterly incapable of doing anything with Mr. Sullivan," even though Sullivan had been "given opportunity after opportunity to upright himself and take advantage of the second and third chances he's been given." [Tr. III 268] The burglary sentences were later reduced by the judge to fifteen years on December 14, 1989. [Tr. III 276-77]

Sullivan appealed his conviction, but his counsel filed a brief under *Anders v. California*, 386 U.S. 738 (1967). The First District Court of Appeal affirmed the conviction, and the Florida Supreme

Court dismissed review. *See Sullivan v. State*, 580 So. 2d 755 (table) (Fla. Dist. Ct. App. 1991); *Sullivan v. State*, 583 So. 2d 1037 (table) (Fla. 1991). In 1992, Sullivan filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850(b), which was denied in 1996. [JA 23-24] He did not appeal the denial of his first post-conviction motion. Despite being convicted in 1989, at no time did Sullivan pursue relief under this Court's decision in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which a plurality of this Court held the death penalty unconstitutional as applied to juvenile offenders under the age of sixteen.

Fifteen years later, in July 2007, Sullivan filed another post-conviction motion under Rule 3.850(b). This time he argued that this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), created a new constitutional right that entitled him to file an otherwise untimely post-conviction motion. The trial court held that Sullivan did not qualify for an exception to Florida's rules regarding timely motions and successive post-conviction motions because *Roper* did not create a new constitutional right that applied to his case. [JA 58-59] The trial court noted that the Florida Supreme Court had held that a life sentence without parole is "perfectly acceptable" under *Roper*, finding that decision applied only to death penalty cases. [JA 58-59] The court therefore dismissed Sullivan's post-conviction motion as untimely. [JA 59]

Sullivan appealed this denial to the First District Court of Appeal of Florida, which affirmed without opinion. *See Sullivan v. State*, 987 So. 2d 83

(Fla. Dist. Ct. App. 2008) (table).[3] Because the Florida Supreme Court lacks jurisdiction under Florida law to review per curiam affirmed decisions of the lower courts of appeal, *see Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006), Sullivan filed a petition for writ of certiorari, which this Court granted on May 4, 2009.

SUMMARY OF ARGUMENT

This Court should not review the merits of Sullivan's claims because they are procedurally barred under state law. Because the trial court ruled that Sullivan's second post-conviction motion was time barred based on an adequate and independent state law ground, review of his Eighth Amendment claims is foreclosed in this Court.

Florida Rule of Criminal Procedure 3.850(b), with limited exceptions, imposes a two-year limitation for the filing of post-conviction motions in noncapital cases. The trial court's decision that this rule procedurally barred Sullivan's second post-conviction motion, and that no exception applied, was an adequate state law ground that precludes review of Sullivan's federal claims. Moreover, Sullivan's second post-conviction motion, asserting *Roper* as the basis for habeas relief, was untimely because he could have made the same claim as part of an initial motion within the procedural time limits set by Florida law, pursuant to this Court's reasoning in *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

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[3] The Florida First District Court of Appeal three-judge panel in this case consisted of Judges Wolf, Lewis, and Thomas. Judge Wolf authored the opinion released two months earlier in *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008).

Even if Sullivan's Eighth Amendment claims were not procedurally barred, that Amendment contains no textual or jurisprudential basis for a categorical ban on life sentences without parole for juveniles of a certain age who commit heinous, violent crimes against vulnerable victims, as Sullivan did. He completely ignores this Court's narrow proportionality jurisprudence as it applies to prison term sentences. This Court has repeatedly held that a sentence of a term of years violates the Eighth Amendment only in "exceedingly rare" cases in which an inference of "gross disproportionality" can be drawn. No inference of gross disproportionality exists for a life sentence arising from the brutal crime of sexual battery, particularly given this Court's characterization of rape as an especially heinous crime, second only to murder. Moreover, this Court has never factored in age in the gross disproportionality analysis, and should not do so in considering particularly violent adult crimes such as rape.

Because no inference of gross disproportionality is raised by Sullivan's sentence, the Court need not conduct a comparison of sentences for similar crimes within Florida or between Florida and other states. Even if it did, however, Florida has imposed life sentences on juveniles for crimes of greater and lesser seriousness than Sullivan's brutal rape, and 42 states permit the imposition of life without parole on a juvenile, with 38 states allowing for such a sentence for non-homicides. Admittedly, the number of juveniles who received these sentences is fewer as the age of the offender declines; but that fact does not undermine the societal consensus that juveniles of even Sullivan's age may be treated as adults in the criminal justice system. Indeed, other courts have affirmed life sentences for juveniles for the especially

heinous crime of sexual battery. No national trend exists moving away from harsh sentences for serious crimes such as rape; in fact, a nationwide trend of getting tougher on crime has occurred over the last two decades since Sullivan was sentenced. Given this national trend, no basis exists for this Court to make comparisons with international law. Even when national comparisons are made, Sullivan cannot show that the sentence for the violent crimes he committed was grossly disproportional.

Sullivan's sole reliance on *Roper* is misplaced. He bases his entire legal argument on the premise that life without parole for a juvenile is equivalent to the death penalty, and therefore the reasoning of *Roper* must apply to his case. These arguments ignore this Court's repeated acknowledgement, including in *Roper* itself, that "death is different." The Court's death penalty jurisprudence setting categorical rules for the imposition of the ultimate penalty does not apply to prison sentences. Virtually every court that has been urged to extend *Roper*'s reasoning to non-capital sentences has refused to do so because death is the only penalty for which it is appropriate to draw categorical exclusions for certain persons or crimes.

Moreover, Sullivan cites a vast array of medical and social science research showing that young juveniles are developmentally different, a fact that state legislatures have known for decades. In determining prison terms, state sentencing laws include age as a factor in deciding the appropriate length of sentence, and all states have juvenile justice systems and programs that attempt to rehabilitate juveniles. For some juveniles and some especially heinous adult-like crimes, however, states have overwhelmingly decided that adult prosecution and adult sentences are appropriate. Here, Sullivan was

indicted by a grand jury and transferred to Florida's adult system, a determination he has not challenged. He now seeks to displace state criminal justice systems by categorically excluding adult sentences resulting from state transfer systems. To do so would eviscerate the core purpose of these systems, which is to mete out adult punishment for adult-like crimes.

The states have sovereign responsibility over their own criminal justice systems, and their legislatures decide the appropriate mix of punishment, deterrence, incapacitation, and rehabilitation in determining appropriate prison sentences. This Court has consistently recognized that only in exceedingly rare cases should the exceptional deference owed to states be overridden. Sullivan's is not such an exceedingly rare case. Instead, his was an intentional, violent crime committed against a vulnerable 72-year-old woman by a juvenile with a prior history of violence and criminal behavior. No basis for a categorical rule prohibiting life sentences for juveniles exists under these circumstances, and Sullivan's reliance on this Court's death penalty jurisprudence is unavailing.

In effect, Sullivan is making the unwarranted suggestion that this Court should order the reconstruction of state criminal systems by requiring the re-institution of the right to parole in some states and the federal government, as well as the prohibition of life without parole sentences for juveniles of a certain age. This Court should instead defer to the majority of states' determination that for some particularly violent crimes, juveniles can be subject to adult prosecution and sentencing, which can include life-without-parole sentences for violent rapes. Sullivan's categorical Eighth Amendment argument to the contrary is unworkable and should be rejected.

ARGUMENT

I. The Trial Court's Ruling – that Sullivan's Post-conviction Motion was Procedurally Barred – is Based on an Independent and Adequate State Law Ground That Forecloses Review in This Court.[4]

Florida Rule of Criminal Procedure 3.850(b), with three exceptions, imposes a two-year limitation for the filing of post-conviction motions in noncapital cases. The trial court ruled that Sullivan's claim could be considered only under the second exception – whether the law had established a new, fundamental, retroactive constitutional right. [JA 57-58][5] The court held that the decision in *Roper v. Simmons*, 543 U.S. 551 (2005), "established only one new constitutional right, the right for a juvenile not to be given the death penalty." [JA 58] Because *Roper* did not establish that a juvenile could not be sentenced to life without

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[4] This Court granted certiorari on both of the questions presented, the second of which goes to the timeliness of Sullivan's state court post-conviction motion. The second question is not listed in Sullivan's merits brief or addressed therein. Ordinarily, such a failure is construed as abandonment of the question. *See Posters "N" Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994); *United States v. Int'l Bus. Machs.*, 517 U.S. 843, 855 n.3 (1996). The State will address the question because Sullivan's post-conviction motion was procedurally barred under state law, and that bar is fatal to this Court's review.

[5] The rule also provides that "[a] motion to vacate a sentence that exceeds the limits provided by law may be filed at any time." This language "refers to a sentence which is above the legislative maximum for the prescribed crime." *Wahl v. State*, 460 So. 2d 579 (Fla. Dist. Ct. App. 1984).

parole, the trial court concluded that Sullivan's claim was procedurally barred under Rule 3.850(b). [JA 58][6]

As will be shown, the trial court properly dismissed Sullivan's post-conviction motion on an independent and adequate state law ground, and this Court is therefore without jurisdiction to review his federal claim.

A. The trial court's ruling rests on a state law ground that is independent of the federal question and adequate to support the judgment.

This Court's decisions have established that a procedural default will bar consideration of a federal claim on either direct or habeas review if the state court holds that its judgment rests on a state procedural bar. The state law ground must be "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. *Harris v. Reed*, 489 U.S. 255, 260-263 (1989); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground is jurisdictional." *Coleman*, 501 U.S. at 729. The bar does not hold in federal habeas proceedings if the petitioner can show cause for the default and prejudice resulting therefrom. *See Teague v. Lane*, 489 U.S. 288, 298 (1999); *Coleman*, 501 U.S. at 750 (1991). Sullivan has not sought federal habeas review.

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[6] As pointed out in the State's brief in opposition, state and federal courts have overwhelmingly held that *Roper* does not extend to juveniles serving long prison sentences or life without parole. [Brief in Opp. 11-13 & n.5]

As noted in *Harris*, "the state court must have actually relied on the procedural bar as an independent basis for its disposition of the case." 489 U.S. at 261-262 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). Here, the trial court's ruling, affirmed without opinion by the First District Court of Appeal, indisputably finds Rule 3.850(b) is a procedural bar. Under this Court's case law, the judgment at issue rests on an independent and adequate state law ground, and therefore this Court lacks jurisdiction to review it.

Harris cites two cases that provide guidance as to what is an "independent" and "adequate" basis for a state procedural default ruling. *See Harris*, 489 U.S. at 261 n.6. The first case cited, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), reasoned that a state procedural ground is not adequate unless the rule is "strictly or regularly followed." *Johnson* relied on previous decisions holding that where state procedural rules are not applied evenhandedly to similar claims, they do not constitute an adequate state ground barring Supreme Court review. *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). Nothing in Sullivan's petition or merits brief suggests that the trial court's denial of relief was inconsistent with the plain language and limitations of Rule 3.850(b), or that Florida courts do not strictly and evenhandedly observe those limitations.

The second case *Harris* cites, *Ake v. Oklahoma*, 470 U.S. 68 (1985), addressed the independence prong of the test. In that case, the Oklahoma appellate court held that a criminal defendant had waived his request for psychiatric assistance at trial by not repeating that request in his motion for a new trial. This Court

found that the Oklahoma waiver rule did not, as a matter of Oklahoma law, apply to fundamental error, and that a violation of a constitutional right was fundamental error under Oklahoma law. Oklahoma could not hold the defendant's claim for psychiatric assistance procedurally barred without ruling, explicitly or implicitly, on the defendant's constitutional right to psychiatric assistance. *See id.* at 74-75. Because resolution of the state procedural question was dependent on determination of this right, the Oklahoma court's decision was not independent of federal law. *Id.* For the same reason, any reliance on *Ohio v. Reiner*, 537 U.S. 17 (2001), is also misplaced. In deciding whether a witness was wrongly granted immunity under state law, the Ohio Supreme Court construed the Fifth Amendment to decide the issue.

Here, in contrast, Rule 3.850(b) does not allow a Florida court hearing a post-conviction motion to decide a claim of an as-yet-unrecognized constitutional right or to decide whether the reasoning of this Court in a particular case should be *extended* to different facts and circumstances to create a new right. The trial court here read *Roper* and drew the simple and obvious conclusion that the right it created applied only to death-sentenced juveniles. Indeed, *Roper* permitted a life without parole sentence for a juvenile. The trial court's decision is thus independent of the merits of Sullivan's federal claim that he has a constitutional right not to be sentenced to life without parole. The trial court did not decide whether such a right exists under the Eighth Amendment and was not permitted to do so by Rule 3.850(b). Sullivan has not contended that the trial court's adherence to Rule 3.850(b) violates a

constitutional right, and therefore *Ake* provides no basis for this Court's review.

B. State courts should not be compelled to adjudicate claims of new constitutional rights in post-conviction proceedings.

Florida, like every other state, has the strongest interest in bringing litigation, including criminal appeals, to a close at some reasonable point. Rule 3.850(b), with certain carefully defined exceptions, promotes Florida's interest in finality. Sullivan does not contend that the rule does not serve a legitimate state interest and in fact has avoided any meaningful discussion of whether the judgment below rests on an independent and adequate state law ground. Nevertheless, the point is jurisdictional, it bids fair to rewrite the rules for post-conviction relief, and it must be addressed.

Any argument asserting the trial court's ruling is not independent of the merits of Sullivan's constitutional claim is in fact an argument that no ruling under the second exception to Rule 3.850(b) can ever be independent when it declines to *extend* case law to recognize a new right. No matter how sympathetically Sullivan's petition and merits brief may be read, they clearly ask that the reasoning of *Roper* be extended to juveniles sentenced to life without parole. Indeed, if *Roper* had determined that the Eighth Amendment prohibits sentencing juveniles to life without parole, there would be no need for Sullivan to revisit state, federal, and international law, or to present all the sociological and psychological studies set forth in support of his argument. What Sullivan's logic implicitly means is

that any decision of this Court whose reasoning might arguably be extended to different facts and circumstances must fall outside Rule 3.850(b). Such an exception swallows the rule. Florida courts (and all others following a rule or post-conviction procedure similar to Rule 3.850(b)) could no longer confine themselves to applying new rights that operate retroactively, but would be compelled to adjudicate new claims based on the extrapolation of those rights.

The invalidation of Rule 3.850(b) in this manner is unwarranted and certainly "antithetical to the doctrinal consistency" that should characterize "sensitive issues of federal-state relations." *See Michigan v. Long*, 463 U.S. 1032, 1039 (1983). To require state courts in post-conviction proceedings to consider federal claims based on the extrapolation of new rulings would set the stage for unending litigation. Appeals of those rulings would inevitably make their way to this Court, greatly increasing its burdens. *See Ake*, 470 U.S. at 75. Moreover, such an attenuation of the independent and adequate state law ground would also remove an obstacle to habeas review in federal district courts, thereby increasing their burdens. *See Coleman*, 501 U.S. at 729-730 (the independent and adequate state ground doctrine "applies to bar federal habeas when a state court decline[s] to address a prisoner's federal claims because the prisoner ha[s] failed to meet a state procedural requirement."). State and federal courts will find themselves adjudicating thousands of cases that heretofore have been procedurally barred.

Sullivan may argue in reply that the Court only infrequently recognizes new, retroactive constitutional rights. That argument is debatable, but it also misses the point. Under Sullivan's view, the

meaning and reach of every such decision will be open to exploration in post-conviction proceedings in every state and federal court. That the argument for relief may be weak or farfetched will hardly deter those challenging a conviction or sentence. It is the opportunity to litigate, not the merit of the argument, that will engender thousands of new cases.

C. This case presents no basis for upsetting long-established state post-conviction procedures because Sullivan's federal constitutional claim could have been asserted at trial and on direct appeal.

No exception to Rule 3.850(b) should be made for Sullivan's claim for the additional reason that it could have been raised at trial and on direct appeal. A plurality of this Court, considering state sentencing laws and the developmental differences between adolescents and adults, held in 1988 that execution of juveniles under sixteen years of age violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Justice O'Connor concurred in the judgment because she did not believe that Oklahoma, in providing for juveniles to be tried as adults, had actually considered whether the death penalty should be imposed on those younger than 16 years of age.

Considering the reasoning of the plurality and Justice O'Connor, Sullivan could have made the same argument he makes now in 1989 or in a *timely* post-conviction motion. This Court's 2005 decision in *Roper* adds nothing that supports Sullivan's claim in a way

that *Thompson* does not.[7] In fact, *Roper* does nothing more than extend the rationale of *Thompson* to include sixteen and seventeen-year-old offenders. Because he failed to timely assert this argument, Sullivan's present claim should be barred.[8]

Finally, Sullivan has argued that the Court should hear his case because it is unlikely that another case involving a thirteen-year-old sentenced to life without parole for a crime that is not a homicide will ever come before this Court. This plea is without merit. First, it constitutes no exception to the *jurisdictional* bar of a judgment based on independent and adequate state law grounds. Second, neither *Thompson* nor *Roper* involved a thirteen-year-old adolescent, but their holdings nevertheless applied to that age group.

This Court may confront a case in which it will decide, as it did in *Roper*, whether the Eighth Amendment prohibits life sentences for adolescents as a group. It may do so in the pending case of *Graham*

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[7] The following year, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court upheld capital punishment for two offenders aged 16 and 17. *Stanford* did nothing to diminish the ruling in *Thompson*.

[8] Sullivan offers no reason why the Court should excuse his 16-year delay. It is not the Court's practice to overlook such extreme tardiness. In *Coleman*, for example, the petitioner filed his notice of appeal from a state court habeas decision three days late. The Virginia Supreme Court then dismissed his appeal. 501 U.S. at 727-728. Coleman thereafter sought review of his constitutional claims in a habeas action in federal court. *Id.* This Court held his federal constitutional claims were procedurally barred. Although Sullivan notes that his appellate counsel filed an *Anders* brief, he has never asserted in a post-conviction motion that his counsel was ineffective for not raising *Thompson v. Oklahoma*.

v. State, Case No. 08-7412, or upon review of one of the many other cases refusing to extend *Roper* to a life-sentenced juvenile. Sullivan will have the benefit of a decision, if it creates a new and retroactive constitutional right applicable to his circumstances. Meanwhile, as the Court has said, clemency is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 412 (1993).

II. Sullivan Entirely Ignores This Court's Eighth Amendment Proportionality Jurisprudence, Which Supports a Life Sentence Without Parole for the Violent Crime of Sexual Battery.

Even if Sullivan's constitutional claim is not time barred, it should be rejected. Inexplicably, Sullivan entirely ignores narrow principles of proportionality review that apply to prison sentences, mentioning only two of the Court's six cases in a single perfunctory footnote on page 41 of his brief. [Br. 41 n.53][9]

In doing so, Sullivan disregards thirty years of non-capital precedents addressing whether a prison sentence for a term of years contravenes the prohibition against cruel and unusual punishment. In these cases, the Court applied a "narrow proportionality" principle, noting that successful challenges based on excessiveness of incarceration

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[9] Indeed, Sullivan's footnote inaccurately describes the *Harmelin* case as one involving an "aggravated non-homicide offense" when the mandatory life sentence without parole upheld in that case was for possession of 672 grams of cocaine. *See Harmelin*, 501 U.S. at 996.

will be "exceedingly rare." *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). The threshold determination involves a comparison of the crime committed and the sentence imposed, and no more, to determine whether an inference of "gross disproportionality" exists. *Harmelin v. Michigan*, 501 U.S 957, 1005 (Kennedy, J., concurring). This "gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer*, 538 U.S. at 76. Only in the extraordinarily rare case where an inference of gross disproportionality is shown does the Court proceed to the next step and consider comparisons of intra- and interjurisdictional data. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

This Court has never considered age in the threshold determination as to whether an inference of gross disproportionality exists. In fact, the analysis focuses on the nature of the offense and the severity of the sentence given, not on the individual characteristics of the offender. Admittedly, at a certain point an offender's young age could play into the gross disproportionality analysis for prison sentences in ways it does not for adult offenders. As the next two sections explain, however, this Court's established analysis, as applied to Sullivan's crimes and sentence, raises no inference of gross disproportionality.

As such, jurisdictional comparisons are unnecessary in this case; but even if they are undertaken, they demonstrate that state legislatures have already woven age deep into the fabric of their criminal justice systems by creating separate juvenile justice systems and taking age into account in decisions as to whether to charge and sentence a

juvenile offender as an adult. There is nothing demonstrating that a majority of states have prohibited life sentences for crimes such as Sullivan's at his age level. The interjurisdictional comparisons do not support the establishment of either a categorical line or an individualized finding that Sullivan's sentence is unconstitutional.

A. Under this Court's precedents, no inference of gross disproportionality exists for the violent crime of sexual battery.

As a threshold matter, Sullivan's life sentence is not grossly disproportionate to the violent and brutal sexual batteries he committed against the 72-year-old victim, particularly when compared to the cases in which this Court has upheld similar sentences for lesser, non-violent property crimes. In five of its six cases involving proportionality review of prison terms, this Court affirmed lengthy, oftentimes mandatory sentences, many of them for life terms:

(a) a mandatory life sentence (with the possibility of parole) for three theft-related felonies (under a recidivist statute) which, in the aggregate, totaled less than $230, *Rummel v. Estelle*, 445 U.S. 263 (1980);

(b) a 40-year sentence for possession and distribution of less than nine ounces of marijuana, *Hutto v. Davis*, 454 U.S. 370 (1982);

(c) a mandatory life sentence (without the possibility of parole) for possession of 672 grams of cocaine, *Harmelin v. Michigan*, 501 U.S. 957 (1991);

(d) a 25-year-to-life sentence pursuant to California's mandatory Three Strikes law where the triggering offense was felony grand theft of three golf clubs amounting to approximately $1200, *Ewing v. California*, 538 U.S. 11 (2003); and

(e) two consecutive 25-year-to-life sentences under California's mandatory Three Strikes law for two counts of petty theft of videocassettes valued at approximately $150, *Lockyer v. Andrade*, 538 U.S. 63 (2003).

The only instance where this Court struck down a prison sentence as unconstitutional was a *mandatory life sentence without parole* for a seventh non-violent felony, the last being a $100 bad check charge. *See Solem v. Helm*, 463 U.S. 277 (1983). In *Solem*, as in all cases involving an application of the narrow "gross disproportionality" standard, the Court has found no constitutional violation if, at the threshold, the seriousness of the offense when compared with the sentence given does not raise an inference of gross disproportionality. An offense's gravity, including the measure of the harm caused to the victim and the violent nature of the crime, are considered. *See id.* at 292. Heretofore, the Court has considered nothing more.

Sullivan's brutal rape of an elderly woman in her own home qualifies as one of the most serious and violent crimes in our society, and is everywhere acknowledged to be one that inflicts serious physical and emotional harm to the victim. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008) ("Rape has a permanent psychological, emotional, and sometimes physical impact on the child"); *Coker v. Georgia*, 433

U.S. 584, 597-598 (1977) ("[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim . . . Short of homicide, it is the 'ultimate violation of self."); *see also Pinson v. Morris*, 830 F.2d 896, 897 (8th Cir. 1987) ("The state is well within its rights, as far as the federal Constitution is concerned, in regarding the crimes of rape and forcible sodomy as deserving of special and severe condemnation.").

Sullivan's life sentence for the two violent sexual battery counts is not a grossly disproportionate sentence under this Court's precedents. If a mandatory life sentence without parole for the mere passive possession of 672 grams of cocaine is constitutional, *Harmelin*, and a mandatory life sentence with the possibility of parole for three theft-related felonies is constitutional, *Rummel*, then it logically follows that a similar sentence for a violent sexual battery is not grossly disproportionate. Sullivan's violent sexual battery is far more serious than the non-violent, passive crimes in *Harmelin* and *Rummel*, for which life sentences have been upheld. Indeed, comparing Sullivan's crime and sentence to those in *Hutto*, *Ewing*, and *Andrade* leads to one unyielding conclusion: no inference of gross disproportionality exists.

Although the Court has not considered age (or any other individual characteristic) in the gross disproportionality analysis, in this case it raises no inference of a constitutional violation. Here, Sullivan's crime was so serious that an inference can be drawn that he intended to commit these heinous acts with knowledge of their seriousness. *See, e.g., Roper*, 543 U.S. at 600 (O'Connor, J., dissenting) (arguing that

while some juveniles may not be sufficiently culpable to warrant the death penalty, "an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty."). Some crimes, such as murder and rape, can be sufficiently horrific that a state's criminal justice system, as formulated by its legislature and implemented by its trial courts, can conclude that a juvenile offender was sufficiently mature to commit those crimes with adult intent. *See id.* at 601. As such, Sullivan – even if he attempted to do so – does not survive the initial threshold, ending the constitutional analysis at this point.

B. Neither comparative jurisdictional analysis nor Sullivan's "objective indicia" support a constitutional violation.

Because Sullivan's sentence is not grossly disproportionate, it is unnecessary to consider intra- and interjurisdictional analyses, which "are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence available leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Sullivan, however, argues that considering his age at the time of the crimes, the imposition of a life sentence is a "freakishly rare" occurrence in most states.

Sullivan does not explicitly engage in the type of jurisdictional analysis this Court has traditionally considered in its non-capital cases. Instead, citing only the Court's death penalty precedents, he claims that "objective indicia" show a national consensus exists against *ever* imposing a life sentence without parole

upon young juveniles regardless of their offense. [Br. 42-57] Neither a proper jurisdictional analysis nor Sullivan's "objective factors" support a constitutional violation. Moreover, even if this Court were to deem it necessary to proceed to the second step of the "gross disproportionality" analysis and conduct an interjurisdictional analysis of the states, it would find that all states consider age as a crucial factor throughout their criminal justice systems, from separate juveniles systems to decisions regarding adult charges and sentences. Such an analysis provides no justification for the age-based categorical Eighth Amendment rule Sullivan is seeking.

First, turning to intrajurisdictional analysis, life sentences without parole may be imposed in Florida for all life and many first-degree felonies, which involve a wide variety of crimes.[10] Juveniles may be tried as adults for these crimes, and if convicted, can be subject to the same sentences as adults. *See, e.g.*, Fla. Stat. §§ 985.556-557 & 985.56, 985.565(4) (2009); §§ 39.02 & 39.04 (1989). These categories of felonies are comparable to Sullivan's sexual battery, a number being less violent than a sexual battery. As such, life sentences may be imposed on juveniles who commit crimes of both greater and lesser violence in Florida.

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[10] First-degree felonies that are subject to life sentences are provided by statute. *See, e.g.*, Fla. Stat. § 787.01 (kidnapping a child under 13); Fla. Stat. § 812.13 (robbery committed while carrying a firearm); Fla. Stat. § 812.133 (carjacking while carrying a firearm); Fla. Stat. § 817.568(10) (certain criminal use of personal identification information while misrepresenting self as law enforcement officer); Fla. Stat. § 893.135 (first degree felony trafficking of illegal drugs).

As to actual sentencing data, the Florida Department of Corrections reports that the number of persons serving life sentences for sexual battery in Florida is 478. Moreover, out of 301 juvenile offenders currently serving life sentences in Florida, more than half were sentenced for a non-homicide offense – including dozens for offenses less violent than Sullivan's.[11] Thirty-nine juveniles were given life sentences for sexual battery.[12] Thus, life sentences are both theoretically available and actually imposed in Florida, and are not isolated or rare events. Sullivan's claim that this type of sentence is rare in Florida cannot be sustained.

Turning to interjurisdictional comparisons, Florida's sentencing laws and rates are not out of line with national data, especially given its comparatively higher population (nearly 19 million) and juvenile crime problem.[13] A supermajority of states – 42 – permits the imposition of life without parole on a

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[11] Data from Bureau of Research & Data Analysis, Fla. Dep't of Corrections, June 10, 2009. Approximately 150 juveniles are serving life sentences in Florida for non-homicides, including offenses such as burglary, robbery and carjacking.

[12] *See id.*

[13] *See, e.g.*, Curt Anderson, *Police Round Up Youths in Slaying of British Tourist*, AP, Sept. 16, 1993; Mike Clary, *Florida Tries to Rescue Sunny Image as Violence Gets Worse*, L.A. Times, Sept. 29, 1993, at A1; Jim Mulvaney, *From Youngster to Gangster: How Florida Boy Shot a Tourist*, L.A. Times, Jan. 16, 1994, at A1; *Germans Wary of Visiting Florida*, St. Petersburg Times, May 18, 1994, at 1E; *Behind the mask of Florida; Ranked as one of top three most dangerous places to visit*, Hamilton Spectator (Canada), Dec. 13, 1994, at A3.

juvenile.[14] Of those, 38 states permit that sentence for crimes other than those resulting in the death of a victim.[15] Notably, Sullivan's concession that at least 40 states allow life without parole for fourteen-year-olds, 27 of which allow it for thirteen-year-olds, is telling. [Br. 49] Sullivan characterizes this potential as "broad theoretical availability," thus conceding that the "sentence available" for the crime he committed at age thirteen would be life without parole in 27 of the 50 states. This data reflects consensus rather than condemnation, more so given no contrary trend exists.

Courts nationwide have sentenced violent offenders to life for similar sexual battery crimes.[16] In

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[14] *See, e.g.*, Stephanie Chen, *Teens Locked Up for Life Without a Second Chance*, http://www.cnn.com/2009/CRIME/04/08/teens.life.sentence/index.html (last visited Sept. 3, 2009).

[15] The Petitioner in *Graham v. Florida* accepts these figures, and they are acknowledged by Sullivan as well. *See* Brief for Petitioner at App'x C, *Graham v. Florida*, No. 08-7412 (Jul. 16, 2009); Br. at 49-50.

[16] *See, e.g., Smith v. State*, 691 S.W.2d 154 (Ark. 1985) (affirming life sentence for rape by 16-year-old offender); *Miller v. State*, 846 A.2d 238 (Del. 2004) (affirming life sentence for unlawful sexual intercourse in the first degree); *Henry v. State*, 342 S.E.2d 499 (Ga. App. 1986) (affirming life sentence for rape of 78-year-old woman); *State v. Cross*, 978 P.2d 227 (Idaho 1999) (affirming life sentence for sexual battery); *State v. Foley*, 456 So. 2d 979, 983 (La. 1984) (affirming 15-year-old's life sentence for rape because "[a]ggravated rape deserves a harsh penalty; it is one of the most violent felonies a person can commit."); *Phipps v. State*, 385 A.2d 90 (Md. Ct. Spec. App. 1978) (affirming life sentence for rape); *People v. Lemons*, 562 N.W.2d 447 (Mich. 1997) (holding that life sentence for first degree sexual offense was proportional and not excessive due to "perversity" of the acts); *State v. Green*, 502 S.E.2d 819 (N.C. 1998) (holding that life sentence for 13-year-old convicted of rape was not cruel and unusual (Continued ...)

addition, a 2005 New York Times study found that more than 25,000 offenders are serving life for non-homicide crimes like rape, kidnapping, armed robbery, assault, extortion, burglary, and arson (16% of lifers were convicted of drug trafficking).[17] Even with such a large number of life-sentenced inmates for non-homicide crimes, however, there is no available data on the number of juveniles nationwide serving a life sentence for the crime of rape.

Life without parole is within the mainstream of state sentencing practices for his crime. No clear national trend indicates that states are moving away from life without parole sentences for juveniles.[18] Indeed, one study (by a group opposed to juvenile life without parole) reports that nationally the number of juvenile offenders serving life sentences in the last 25 years has more than quadrupled, with large states such as Pennsylvania, California, and Michigan accounting for the most juveniles serving life without parole sentences.[19] In this study, Florida ranks sixth

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punishment); *State v. Smiley*, 689 N.W.2d 427, 429 (S.D. 2004) (affirming two concurrent life sentences for rape of a 7-year-old against Eighth Amendment challenge); *State v. Woodall*, 385 S.E.2d 253, 363 (W. Va. 1989) (affirming two life without parole sentences for rape because "any sentence short of [death], including life without parole, for serious crimes against the person, passes constitutional muster.").

[17] *See* Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times, Oct. 5, 2005 at 1-1.

[18] *See, e.g.*, Ashley Nellis & Ryan S. King, *No Exit, The Expanding Use of Life Sentences in America*, The Sentencing Project (July 2009) (hereinafter "No Exit").

[19] *See id.* at 6, 17.

among states in raw numbers and is below the national average (ranked 29th) with respect to juvenile life without parole sentences as a percentage of its entire life-sentenced population.[20] According to another study, 7.2% of youth offenders nationwide are serving life without parole for crimes other than homicide, such as kidnapping, property crimes, sex crimes (like Sullivan's sexual battery), and other violent crimes.[21]

Finally, Sullivan's analysis of "objective indicia" involves three points that are subject to sharp critique. First, Sullivan claims that juvenile life without parole is simply an "unconsidered consequence" of nationwide legislative trends and

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[20] *See id.*

[21] *See The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Human Rights Watch & Amnesty Int'l 27 (2005); *see also Calderon v. Schribner*, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009) (upholding life without parole for a 17-year-old convicted of kidnapping for ransom); *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008) (upholding life without parole for 15-year-old convicted for kidnapping and rape); *State v. Standard*, 569 S.E.2d 325 (S.C. 2002) (upholding life without parole for burglary committed by 15-year-old); *State v. Green*, 502 S.E.2d 819 (N.C. 1998) (holding life sentence for 13-year-old for burglary and rape not grossly disproportionate to the crime); *see also Jackson v. State*, Case No. 10-07-00089-CR, 2008 Tex. App. LEXIS 698, *15–20 (Tex. App. Jan. 30, 2008) (upholding life sentence, perhaps with possibility of parole, for juvenile offender convicted of aggravated robbery); *State v. Ira*, 43 P.3d 359 (N.M. 2002) (aggregate adult sentence of 91 and one-half years' for sexual battery offenses committed by a 15 year-old not grossly disproportionate); *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) (sentencing of 13 year-old to 100-year term (consecutive sentences) for non-homicide crimes not considered grossly disproportionate).

changes that resulted in most states (a) eliminating parole and increasing the length and certainty of actual sentences imposed; and (b) allowing juveniles who committed certain crimes to be prosecuted and sentenced as adults in criminal courts. [Br. 44-47] According to Sullivan, these broad changes – that specifically addressed the types of crimes he committed – are nothing more than an "adventitious" result of "two distinct movements" that, through inadvertence or happenstance, swept juvenile offenders into adult courts and adult sentences.

This claim, however, runs counter to the fundamental notion of what legislatures do, which is to act incrementally and purposefully with awareness of the laws they have previously enacted. *See, e.g., Albernaz v. U.S.*, 450 U.S. 333, 341-342 (1981) (courts assume legislature knows of it prior enactments and that "silence" on a topic creates no presumption to the contrary). Legislatures nationwide clearly intended to make violent and serious crimes subject to greater sanctions for adults and juveniles alike. Florida is no exception. The state consciously and directly confronted its juvenile crime problem by allowing some juveniles to be prosecuted in adult court, subjecting them to adult sentences.[22] It is wholly

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[22] *See, e.g.*, Fla. Stat. §§ 775.082(8)(d), 921.002(1)(g), 985.227 (1)-(2), & 985.233(1)(b) (2003); *see also* Linda Kleindienst & Diane Hirth, *House Gets Tough with Juveniles*, Sun Sentinel (Ft. Lauderdale, Fla.), Nov. 4, 1993, at A1 (reporting a 119-0 vote on a special session bill that required juveniles to be tried as adults in some cases); Jerry Fallstrom, *Young Killers Fuel Rise in Violent Crime; Florida's Crime Figures for 1993 Bolster Arguments in Tallahassee for a Get-Tough Approach to Teen Criminals*, Orlando Sentinel, Mar. 17, 1994, at A1; William Booth, *Florida Wants to be on Cutting Edge of Get-Tough Crime Remedies*, Wash. Post, Feb. 17, 1994, at A3; David Osbourne, (Continued ...)

implausible that the legislature simply had no idea, and would be surprised to know, that its sentencing laws subject juveniles to increased incarceration, including life sentences. Indeed, Sullivan's own life sentence underscores the point that life sentences for juveniles have been available over the past twenty years, even for non-homicides; had the Florida legislature believed this result was simply an "adventitious" and unintended consequence, the laws would have been changed. They have not; indeed, proposed changes to do so have failed.[23]

Second, Sullivan points out that a few states (eight by his calculation) have set a minimum age for the imposition of life without parole (varying from sixteen to eighteen, mostly for murder), and that only one state, Massachusetts, allows this punishment for murders by juvenile offenders fourteen or older. [Br. 47-49] Sullivan claims the absence of any statute "expressly" authorizing life sentences against thirteen year-olds reflects a national consensus against such punishment.

As noted, however, Sullivan concedes that at least 40 states allow life without parole for fourteen-year-olds, 27 of which allow it for thirteen-year-olds.[24]

Florida turns the screws on offenders, The Independent (U.K.), Apr. 3, 1994; Jill Jorden Spitz, *The Party's Over for Young Offenders, But Critics are Wary*, Orlando Sentinel, Jan. 8, 1995, at A1.

[23] *See, e.g., No Exit, supra* note 18, at 41; *see also* H.R. 2289, 111th Cong. (1st Sess. 2009) (federal bill to give meaningful parole to juvenile offenders).

[24] Sullivan further notes that "[s]ome death-penalty States explicitly abolished the death penalty for juveniles by provisions (Continued ...)

In fact, 42 states[25] make life without parole available against juveniles.[26] In addition, Sullivan does not indicate which states make parole generally available for these crimes and which have modified or eliminated parole (states with parole systems are less likely to allow life sentences without parole). In short, Sullivan's argument is unpersuasive on this point.

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that arguably authorize life without parole," listing Illinois, Maryland, Nevada, New Jersey, North Carolina, Ohio and Virginia. [Br. 48 n.61]

[25] The 42-state figure is often credited to the data in the report *The Rest of Their Lives*, *supra* note 21. *See, e.g.*, Chen, *supra* note 14. Other studies have found this figure to be 43 states. *See* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 1031-1044 (2008) [hereinafter *Global Law & Practice*]. Still other reports place the figure at 44 states. *See Juvenile Life Without Parole*, http://www.pbs.org/wnet/religionandethics/episodes/january-30-2009/juvenile-life-without-parole/2081/ (last visited Sept. 8, 2009). The details and distinctions of states' criminal codes and sentencing law, as well as personal interpretations of those statutes by the studies' authors, might explain the reason for the variety of figures. For instance, the 43-state figure excludes Montana, because of the amendment to Montana Code section 76-18-222(1) (2007), which set forth that *mandatory* minimum sentences and restrictions on parole eligibility do not apply when the offender is under 18. *Global Law & Practice*, at 1037. Another study may have instead included Montana in a count of juvenile life without parole states because trial judges there still appear to have the discretion to impose such sentences. In any event, the number of states permitting life without parole for juveniles is at least 40 (as well as the federal government), or more than 80% of states, a figure undoubtedly counter to any notion that a consensus against the sentence has developed.

[26] *See, e.g.*, Chen, *supra* note 14 (last visited Sept. 3, 2009) (citing sources as Human Rights Watch, Equal Justice Initiative, National Conference of State Legislatures, and U.S. Dept. of Justice).

Third, Sullivan claims that the actual imposition of a life sentence without parole on a thirteen- or fourteen-year-old (a "young teenager") is an "aberrant, vanishingly rare occurrence" that warrants categorical elimination nationwide. [Br. 49-57] Sullivan concedes, however, that at least 40 states make this sentence broadly available against fourteen year-olds, 27 states allowing it specifically against thirteen year-olds. [Br. 49-50] He further notes that his counsel's self-generated report (the "EJI Report")[27] establishes that nine juveniles are under life sentences for crimes committed at age thirteen nationwide and 73 are similarly incarcerated for crimes committed at age fourteen. [Br. 50-51][28] He highlights the magnitude of the juvenile crime problem nationwide by pointing out government data reflecting that 290,188 juveniles fourteen and older were arrested from 1978 to 2007 for serious crimes such as homicides, rapes and robberies for which a life sentence could have been imposed. [Br. 51] He argues that because only 81 (nine plus 73) juveniles of age thirteen or fourteen are incarcerated for life, this

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[27] Sullivan places almost total reliance on this report, entitled *Cruel and Unusual: Sentencing 13- and 14-Year Old Children to Die in Prison*, for his numerical claims. The EJI Report, which was prepared by the organization pursing this and other related anti-incarceration litigation, has not been subject to peer review, verification of its methodology or empirical validity, or other ordinary means used in litigation to assess reliability and trustworthiness.

[28] In a footnote, Sullivan points out that the EJI Report shows only a handful of juvenile offenders are serving life without parole sentences for non-homicide offenses committed at ages thirteen or fourteen. [Br. 51 n.64] His argument, however, focuses on a categorical ban on the use of life without parole for juveniles for any offense.

practice must be condemned nationally, given the extraordinarily large pool of juvenile arrests.

In doing so, Sullivan acknowledges a serious national juvenile crime problem (one that caused the increased sentencing and juvenile reforms with which he disagrees), but fails to make a valid comparison. While he claims that life sentences are aberrations and vanishingly rare, Sullivan offers no evidence of how often such crimes occur and are prosecuted under facts similar to Sullivan's violent rape. It is likely that the commission of rape by thirteen and fourteen year-olds is less prevalent than similar crimes by fifteen, sixteen and seventeen year-olds; for all the data show, the small number of actual sentences reflects the rarity of the offense itself by similar offenders. Indeed, the relatively small number may be due, at least in part, to enhanced penalties against juveniles, such as Sullivan, that have deterred others from such conduct over the past decade. Moreover, it stands to reason that offenders of a younger age would not be given life sentences as often, either because they do not commit serious crimes as often as adults, or because, unlike Sullivan, they have no prior record that would prompt their transfer into the adult system. Sullivan's superficial analysis takes account of none of these variables, or the many others that are relevant to complexities of the criminal justice system.

Sullivan also attempts to make "parallel" comparisons of the number of juvenile life without parole sentences nationwide with the approximate number of juvenile death sentences at issue in *Roper* and the number of such sentences at issue in *Atkins v. Virginia*, 536 U.S. 304 (2002). This comparison is tenuous, if not meaningless. The 72 or so juvenile death sentences at the time of *Roper* reflected

sentences for all juveniles under the age of eighteen; the 71 or so death sentences at the time of *Atkins* reflected all such sentences for all ages with mental impairments nationwide. If the point of the analogy is to establish a benchmark for a categorical ban on juveniles under the age of eighteen as a class as in *Roper*, the closest comparison would show that thousands of juveniles are subject to life sentences without parole.[29]

In passing, Sullivan again cites the EJI Report, noting that 70% of the thirteen and fourteen year-olds serving life sentences without parole are racial minorities, asserting that these sentences arose during a time when fears of increased juvenile crime were unnecessarily heightened. [Br. 54] He claims that such fears were bogus, and that the "rate" of sentencing for young juveniles has "declined dramatically." [Br. 54] Juvenile crime, of course, was a genuine and serious problem that prompted many states, including Florida, to enact stiffer laws against juveniles, which can easily explain, at least in part, why the rate of life sentencing has declined since the laws' enactment. As to race, the fact that the EJI Report shows a 70%-30% split for minorities and non-minorities needs greater explanation because it is unclear whether these data are over- or under-representative of the populations from which they were drawn.

Without a demonstrable interjurisdictional analysis disfavoring life sentences for juveniles of Sullivan's age for serious crimes such as sexual

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[29] *See, e.g.*, Chen, *supra* note 14 (last visited Sept. 3, 2009); *The Rest of Their Lives*, *supra* note 21.

battery, Sullivan's reliance on international law is unwarranted. International comparisons can serve only as a confirmation of the Court's independent determination of the standards of decency in our own country. *See Roper*, 543 U.S. at 578 ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); *Atkins*, 536 U.S. at 316 n.20 (2002) (noting international opinion supported the states' legislative consensus barring the execution of mentally retarded offenders); *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

In sum, this Court's non-capital proportionality precedents – as applied to Sullivan's serious, violent crime of rape – establish no inference of gross disproportionality. Accordingly, there is no need for intra- or interjurisdictional comparisons. Even if such an inference could be drawn, however, national comparisons demonstrate that there is no consensus against life sentences for juveniles, particularly for heinous crimes such as sexual battery. As discussed in the next section, this Court's death penalty jurisprudence provides no support for Sullivan's proposed categorical rule for age in relation to prison sentences, particularly when buttressed against the states' overwhelming consideration of age in their criminal justice systems.

III. *Roper* Does Not Alter Proportionality Principles as Applied to Juvenile Incarceration or Compel a Categorical Rule Against Life Sentences Without Parole.

The premise of Sullivan's entire argument is that life without parole for a juvenile of a certain

young age is equivalent to the death penalty. While *Roper* excluded juveniles as a class from the death penalty, it affirmed the Missouri Supreme Court's decision to re-sentence Simmons to life in prison without parole. *Roper*, 543 U.S. at 560, 578. As discussed below, *Roper* has limited application, if any, to juveniles prosecuted and sentenced as adults. In addition, age is already woven into the criminal justice systems of all 50 states, where only the worst juvenile offenders are treated as adults for purposes of charging, adjudication, and sentencing.

A. Death is different: *Roper* does not eliminate lengthy sentences, including life sentences, for violent offenses.

Sullivan wrongly equates the death penalty with life imprisonment, claiming they are essentially the same because each imposes a "terminal, unchangeable, once-and-for-all judgment" that the offender is "forever unfit to be a part of civil society." [Br. 5] This analogy is highly inaccurate.

Death is terminal. The death penalty extinguishes a human life; a life sentence preserves a person's natural life. An offender serving a life sentence continues to have many opportunities, some contingent on behavior, to enjoy the benefits of civil society. These include visitations and communications with friends and family, the possibility of marriage, educational programs, the expression of opinion, the exercise of religion, and other similar activities. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). Indeed, *Roper*, in preserving the offender's "potential to attain a mature understanding of his own humanity," necessarily

considered that potential would be realized, if at all, in the context of life-long incarceration. *Roper*, 543 U.S. at 574; *see also Kennedy*, 128 S. Ct. at 2665 (reasoning that "[i]n most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.")[30]

Virtually every court that has been asked to extend the reasoning of *Roper* to cases other than those involving the death penalty has refused to do so.[31] They are correct because death is the only

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[30] *See also Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of punishment meted out to Rummel."); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further"); *see also Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (internal citations omitted) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heighted standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable penalties; that death is different."); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("The qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

[31] *See, e.g., United States v. Feemster*, 483 F.3d 583, 587 (8th Cir. 2007) (refusing to extend reasoning of *Roper* to prevent use of juvenile crimes committed as enhancements on current sentence); *Calderon v. Schribner*, 2009 WL 89279 (E.D. Cal. 2009) (finding LWOP sentence permissible for 17-year-old for a violent felony not resulting in death); *State v. Ninham*, 767 (Continued ...)

penalty this Court has seen fit to limit for entire categories of persons and crimes. *See Roper, supra*; *see also Atkins*, 536 U.S. at 304; *Kennedy*, 128 S. Ct. at 2650, 2665. In contrast, life sentences have never been reserved by this Court for only the worst crimes or offenders. *See Harmelin*, 501 U.S. at 995 (life without parole constitutional for cocaine trafficking offense).

Sullivan seeks to equate his "death in prison" circumstance to *Roper* by arguing that courts should no longer be permitted to make individualized sentencing determinations for juveniles under a certain age, even when they commit heinous non-homicides. Instead, analogizing to *Atkins, Kennedy,* and *Roper*, Sullivan contends that a categorical rule is warranted for juveniles that precludes life without the possibility of parole. In *Roper*, however, the Court explicitly limited its holding to the death penalty, pointedly noting that "[w]hen a juvenile offender commits a heinous crime, *the State can exact forfeiture of some of the most basic liberties*, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 573-74 (emphasis added). As noted, the juvenile offender in *Roper* had been re-sentenced to life without parole.

N.W.2d 326 (Wisc. Ct. App. 2009) (LWOP for 14 year old does not violate *Roper*); *Cobos v. Dennison*, 825 N.Y.S.2d 332, 332 (N.Y. App. Div. 2006) (refusing to extend *Roper*'s reasoning to parole hearings); Opp. To Cert. at 13-14. Only one court has extended *Roper*'s reasoning and logic to find a sentence of imprisonment unconstitutional. *In re Nunez*, 93 Cal. Rptr. 242, 263 (Cal. Ct. App. 2009).

In short, this Court has never concluded that judges and juries are unable to render life sentences because they cannot properly account for a juvenile's age, background, and potential, as the trial judge clearly did with Sullivan.[32] Indeed, no doubt exists that age is already a deeply engrained part of the states' criminal justice systems, particularly the determination of whether juveniles should be tried and sentenced as adults for certain crimes.

B. Age, as a characteristic of the offender, is already woven deeply into the fabric of state criminal justice systems.

The medical and social science research on juvenile development upon which Sullivan heavily relies for his constitutional argument does little to advance his position. In fact, the states have recognized the differences between juveniles and adults by treating the two differently within their criminal justice systems, unless a decision is made that under the circumstances, a juvenile should be

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[32] At several points during Sullivan's sentencing on December 12, 1989, the judge specifically referred to Sullivan's extensive criminal history, considering the possibility of rehabilitation while weighing the strong interest in protecting the community from Sullivan's escalating violence. The judge found that "[t]he juvenile system has been utterly incapable of doing anything with Mr. Sullivan" even though Sullivan "was given opportunity after opportunity to upright himself and take advantage of the second and third chances he's been given." [Tr. III 268] The judge therefore concluded that "the protection of the community requires adult disposition" due to Sullivan's violent record, and that assignment to the juvenile justice system would not adequately protect the public or assist in rehabilitating Sullivan. [Tr. III 270-71]

treated as an adult. As noted, Sullivan does not challenge these decisions, nor does he challenge the longstanding systems all 50 states already have in place to account for youth in the administration of criminal justice.

It has been well known for ages that juveniles generally lack mature judgment and that their age level matters in many contexts. In fact, Sullivan points to "hundreds" of state and federal laws that, in various contexts, recognize the special nature of juveniles and afford them differential treatment. [Br. 30-35 & Appendix] Yet Sullivan omits from this extensive list the wide swath of laws nationwide and in Florida that give special consideration to juveniles in the criminal justice system.

All states have laws establishing juvenile justice systems and programs to contend with the vast majority of youthful offenders. These systems deal with juvenile crime problems[33] ranging from the minor types of youthful indiscretions that occur with regularity to the less frequent, but horrific premeditated acts of violence. That society may assign lesser culpability to juveniles as a class does not

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[33] *See, e.g., Juvenile Justice: A Century of Change*, U.S. Dep't of Just., Off. of Juv. Just. and Delinquency Prevention 2 (Dec. 1999), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf. (Juvenile Justice History); *Combating Violence & Delinquency: The National Juvenile Justice Action Plan Report*, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention, 6, 19 (March 1996), *available at* http://www.ncjrs.gov/pdffiles/jjplanfr.pdf (DOJ Action Plan); *Delinquency Cases Waived to Criminal Court, 2005*, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 1 (June 2009), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/224539.pdf.

compel the conclusion that states may not punish as adults those who intentionally cause serious harm and violence to others.

Indeed, Sullivan's argument reduces to the unacceptable proposition that because juveniles *as a class* lack full maturity and judgment, none – even those who plan and commit the most heinous acts – can be constitutionally punished with lengthy sentences. But states have overwhelmingly decided that those juveniles who engage in certain types of "adult" crimes that involve the planning and premeditation of acts of violence may be treated differently. To do so does not ignore that many juvenile acts are not suitable for "adult" treatment; indeed, the data overwhelmingly show that society generally treats most juveniles as a class with great lenience when compared to adults.[34]

Sullivan does not contend that he was not properly indicted as an adult; rather, he only challenges the end result, an adult sentence that he claims cannot be applied to *any* juveniles of a certain age adjudicated as adults. His reasoning is circular. A major reason for the laws allowing the filing of "adult" charges against juveniles is to provide for potentially stiffer "adult" sanctions to deter and punish, a feature of state direct file systems that would be undermined radically if age categorically bars harsher punishments. This Court should not create a categorical Eighth Amendment rule that upsets the balance states have struck between adjudicating juveniles in their juvenile justice systems and

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[34] *See* Juvenile Justice History, *supra* note 33, at 2.

adjudicating some juveniles of exceptionally serious crimes as adult in the adult systems.

C. *Roper* does not displace state sentencing laws, which must be flexible to allow for the mix of punishment, deterrence, avoidance of recidivism, and rehabilitation that best address serious crime problems.

Sullivan argues that juveniles cannot make responsible decisions, are susceptible to risky behavior and peer influence, will outgrow criminal behavior,[35] and need rehabilitation and parole, not punishment. That is undoubtedly true for some, but Sullivan's offense was no youthful indiscretion and it did not arise from a momentary lapse of judgment or peer pressure. His arguments, going to the appropriate mix of incapacitation, deterrence, and rehabilitation, should be directed to the legislative branch. Precisely because these questions provoke "deeply conflicting interests[] and intractable disagreements," this Court has nearly always left them to the state legislatures and trial judges:

> [The] fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts ... The function of the legislature is primary, its exercises fortified by

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[35] Sullivan's assertion that "[a]lmost all [juveniles] will outgrow criminal behavior" [Br. 5-6], is insupportable; notably, he cites no data whatsoever showing that *violent* juveniles have a lower rate of recidivism than violent adults.

> presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom and propriety.

Id. at 998-999 (Kennedy, J., concurring) (internal quotation marks and citations omitted).

The states have "sovereign responsibilities to promulgate and enforce [their] criminal law[s]," *Rummel*, 445 U.S. at 303 (Powell, J., dissenting). State legislatures therefore decide what objectives punishment should serve. Florida, for example, long ago dismantled its parole system, following reports of abuses of discretion. *Roberson v. Fla. Parole & Probation Comm'n*, 444 So. 2d 917, 920 (Fla. 1983). Congress abolished the federal parole system in the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837. This Court has held that the Constitution "does not mandate adoption of any one penological theory." *Ewing*, 538 U.S. at 25 (quoting *Harmelin*, 501 U.S. at 999). Incapacitation and deterrence are therefore legitimate state policy choices which this Court has seen no need to supervise under the Eighth Amendment. *See Rummel*, 445 U.S. at 281-82.

In short, federal and state individual criminal justice systems have "accorded different weights" to the goals of retribution, deterrence, incapacitation, and rehabilitation, and are entitled to do so without running afoul of the Constitution. *See Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring). It is, accordingly, inappropriate to compare interstate sentences for similar crimes. *See id.* at 999-1000 (reasoning that "differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison

terms for particular crimes."). The fact that a state has the most severe punishment for certain crimes does not render its sentencing violative of the Eighth Amendment. *See id.* at 1000. It is for this reason that a narrow proportionality review of sentences defers to states except in the most egregious situations. *See, e.g., Solem*, 463 U.S. at 291 n.17.

Sullivan cites a host of studies and articles discussing the development of juveniles at various ages. But these only put in contemporary academic language what has long been recognized and accounted for in every state – that in varying ways juveniles offenders are different. The fact remains, however, that "[l]egislatures are better qualified to weigh and evaluate" such studies "in terms of their own local conditions and with a flexibility of approach that not available to the courts." *Roper*, 543 U.S. at 618 (Scalia, J., dissenting); *see also Thompson*, 487 U.S. at 854 (O'Connor, J., concurring) (reasoning that "qualitative characteristics" among juveniles "vary widely among different individuals of the same age," and therefore the Court should not substitute its "inherently subjective judgment about the best age at which to draw a line" for the judgments of state legislatures). For this reason, this Court has properly refused to rest its Eighth Amendment doctrine on "public opinion polls, the views of interest groups, and the positions adopted by various professional associations," rejecting these "uncertain foundations" in favor of the concrete sentencing laws and applications of those laws within individual states. *See Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion). State legislatures and sentencing judges have always decided when an adult punishment is appropriate depending on the nature of the crime, and Sullivan presents no sound reason for

overturning decades of this Court's jurisprudence in favor of a new, uncharted categorical rule.

D. The categorical rule suggested by Sullivan is ill-defined and unworkable.

Sullivan claims that a categorical line – at some undefined point between fourteen to eighteen years of age – can be "readily" drawn. [Br. 57-61] His inability to be more precise only underscores the lack of reliable guideposts for such a decision. He again relies on *Roper* for the proposition that like the death penalty for juveniles under 18, the same constitutional exclusion is necessary for life-without-parole sentences for "young adolescents." [Br. 57]

As discussed, however, *Roper* and *Thompson* reflect the Court's reasoning that "death is different." Accordingly, the "lesser culpability" of juvenile offenders justified categorical exclusion from that ultimate penalty under the Eighth Amendment. This Court has never set in stone a categorical divide for lesser sentences, or suggested it could do so; instead, states are left to decide the appropriate term of years based on the nature of the offenses they define. Any Eighth Amendment problems with individual sentences are determined on a case-by-case basis. In "exceedingly rare" cases an offender may be able to show "gross disproportionality." *See Lockyer*, 538 U.S. at 73, 76; *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

Moreover, the common law did not categorically preclude the prosecution of a felony against 13- and 14-year-olds. Minors under seven were considered incapable of possessing criminal intent; beyond that

age, they could be arrested, tried, and punished like adult offenders, including capital sentences, subject to a rebuttable presumption that those 14 and under lacked the capacity to commit a felony. *See In re Gault*, 387 U.S. 1, 14-16 (1967); *see also Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (citing 4 W. Blackstone, Commentaries 23-24; 1 M. Hale, Pleas of the Crown 24-29 (1800)). Sullivan does not contest his transfer to and adjudication in adult court under Florida's transfer laws. Instead, he seeks a categorical rule that would make the common law presumption irrebuttable as applied to life without parole sentences, a result he cannot fully explain in his attempt at line-drawing.

For all its reliance on sociological and psychological studies, Sullivan's argument hinges on the proposition that even the most violent juveniles are exempt from life sentences without parole because a theoretical possibility exists they may reform as their judgment matures during incarceration and, at some point, be ready for release back into society.[36] Sullivan offers no guidance as to how this amorphous proposition can operate as a constitutional standard as applied to parole. If the possibility of reform, rather than gross disproportionality, is the constitutional standard for juvenile offenders, why should it apply only to a life sentence rather than a sentence of 20, 30 or 40 years? If gross disproportionality is no longer the measure, how is a court to determine, within the infinite range of sentencing possibilities, what is

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[36] This theoretical reform is why executive clemency is available under Florida's constitution, which provides that the Governor with the approval of two cabinet members may grant full or conditional pardons and commute punishment. Fla. Const. art. IV, § 8.

excessive and what is not? Logically, Sullivan's proposed standard would apply to any crime committed by a juvenile, including a homicide, and to any sentence. It would thus call into question almost any sentence for a term of years.

Sullivan fails to address the ramifications of his argument on Eighth Amendment principles. For now, and at least for juvenile offenders sentenced to life, he apparently seeks a mandate for the reconstitution of parole boards that many states and the federal government abolished in the 1980s. *See, e.g.*, Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837. Those boards' decisions were often perceived as arbitrary and standardless. *See United States v. Weaver*, 920 F.2d 1570, 1575 (11th Cir. 1991); *United States v. Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir. 1989); *Roberson v. Fla. Parole & Probation Comm'n*, 444 So. 2d 917 (Fla. 1983). Nonetheless, Sullivan's constitutional logic leads to the conclusion that all juveniles sentenced as adults, no matter the crime, should have the constitutional right to parole board review. And presumably, juveniles would have the further right (at untold state expense) to programs that assist them in exercising their right to reform. This Court should not countenance such interference with state (and federal) legislative judgments.

CONCLUSION

The Court should find that certiorari was improvidently granted; alternatively, the Court should hold that Sullivan's sentence does not violate the Eighth Amendment.

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REPLY BRIEF

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JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

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186

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. FLORIDA'S SUBMISSIONS ON THE MERITS LACK SUBSTANCE 1

A. Far from Being Widely Accepted, the Practice of Condemning Young Adolescents to Die in Prison Is Almost Universally Repudiated in This Country 1

B. Florida's Claim of Justification for Sentencing "The Worst of the Worst" Among Juvenile Offenders to Lifelong Incarceration Fails Because, as *Roper* Teaches, the Immature and Transient Nature of a Young Adolescent's Personality Precludes a Reliable Judgment That He or She Deserves That Indelible Brand 6

C. Requiring States to Make the Determination About an Offender's Fitness to Rejoin Society at a Time in the Course of the Individual's Development When That Determination Can Be Made with Some Accuracy Will Not Unleash a Juvenile Crime Wave or Impose an Impractical Burden on Criminal Justice Systems 11

TABLE OF CONTENTS – Continued

Page

II. FLORIDA'S DEPICTION OF JOE SULLIVAN AND HIS CASE IS A DISTORTION 15

III. FLORIDA'S OBJECTIONS TO THIS COURT'S JURISDICTION ARE UNFOUNDED 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 25, 26

Bover v. State, 797 So. 2d 1246 (Fla. 2001) 28

Carter v. State, 786 So. 2d 1173 (Fla. 2001) 28, 29

Davis v. State, 661 So. 2d 1193 (Fla. 1995).....28

Deering v. State, 988 So. 2d 1237 (Fla. 5th Dist. Ct. App. 2008).....28

Dixon v. State, 730 So. 2d 265 (Fla. 1999) 28

Fla. Bar, In re Plant, 728 So. 2d 205 (Fla. 1998).....21

Fla. Bar v. Plant, 698 So. 2d 1226 (Fla. 1997) 21

Fla. Bar v. Plant, 699 So. 2d 1376 (Fla. 1997) 21

Fla. Bar v. Plant, 848 So. 2d 1156 (Fla. 2003).....21

Floyd v. State, 808 So. 2d 175 (Fla. 2002).....16

Gerstein v. Pugh, 420 U.S. 103 (1975) 14

Hopping v. State, 708 So. 2d 263 (Fla. 1998).....28

Hughes v. State, 826 So. 2d 1070 (Fla. 1st Dist. Ct. App. 2002).....28

Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986).....25

In re Jury Instructions in Criminal Cases, 911 So. 2d 766 (Fla. 2005) 21

Maddox v. State, 760 So. 2d 89 (Fla. 2000) 28

Ohio v. Reiner, 532 U.S. 17 (2001).....25

Owens v. State, 59 So. 2d 254 (Fla. 1952).....21

TABLE OF AUTHORITIES – Continued

Page

Parker v. State, 987 So. 2d 177 (Fla. 1st Dist. Ct. App. 2008).....27

Pfoutz v. State, 910 So. 2d 946 (Fla. 5th Dist. Ct. App. 2005).....28

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

Saintelien v. State, 990 So. 2d 494 (Fla. 2008).....28

State v. Callaway, 658 So. 2d 983 (Fla. 1995).....28

State v. Mancino, 714 So. 2d 429 (Fla. 1998).....28

State v. Whitfield, 487 So. 2d 1045 (Fla. 1986).....28

Summers v. State, 747 So. 2d 987 (Fla. 5th Dist. Ct. App. 1999).....27

Thompson v. Oklahoma, 487 U.S. 815 (1988)....5, 10, 13

Wahl v. State, 460 So. 2d 579 (Fla. 2d Dist. Ct. App. 1984).....27

Williams v. State, 957 So. 2d 600 (Fla. 2007).....28

Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).....16

Wright v. State, 911 So. 2d 81 (Fla. 2005).....28

Young v. State, 619 So. 2d 378 (Fla. 2d Dist. Ct. App. 1993).....27

STATUTES

Ala. Code § 12-15-203.....1

Ala. Code § 15-22-28(e).....15

Ariz. Rev. Stat. Ann. § 13-501.....1

TABLE OF AUTHORITIES – Continued

Page

Ark. Code Ann. § 9-27-318 1
Cal. Welf. & Inst. Code § 602 1
Colo. Rev. Stat. Ann. § 18-1.3-401(4)(b) 15
Conn. Gen. Stat. Ann. § 46b-127 1
Del. Code Ann. tit. 10, § 1010 4
Fla. R. Crim. P. 3.800(a) 27
Fla. R. Crim. P. 3.850 ..... 26, 27
Fla. Stat. Ann. § 775.081 17
Fla. Stat. Ann. § 985.0301(5)(d)-(e) 9
Fla. Stat. Ann. § 985.556(4)(c)(8) 9
Fla. Stat. Ann. § 985.56 ..... 4, 10
Haw. Rev. Stat. Ann. § 571-22(d) 4
Idaho Code Ann. § 20-509(1) 4
Iowa Code Ann. § 232.45 1
Iowa Code Ann. § 901A.2(6) 15
Iowa Code Ann. § 903B.1 15
Ky. Rev. Stat. Ann. § 635.020 1
La. Child. Code Ann. art. 857 ..... 1, 5
Mass. Gen. Laws ch. 119, § 74 1
Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06 4
Me. Rev. Stat. Ann. tit. 15, § 3101 4
Mich. Comp. Laws Ann. § 712A.2d 4
Mich. Comp. Laws Ann. § 791.234(7) 15

TABLE OF AUTHORITIES – Continued

Page

Minn. Stat. Ann. § 260B.125 1
Miss. Code Ann. § 47-7-3(1) 15
Mo. Ann. Stat. § 558.019(4) 15
N.D. Cent. Code § 12.1-04-01 1
N.J. Stat. Ann. § 2A:4A-26 1
N.M. Stat. Ann. § 32A-2-3 1
Neb. Rev. Stat. Ann. § 29-2204(1)(a)(ii) 15
Neb. Rev. Stat. Ann. § 43-247 4
Neb. Rev. Stat. Ann. § 83-1,110(1) 15
Ohio Rev. Code Ann. § 2152.02(6) 9
Ohio Rev. Code Ann. § 2152.10 ..... 1, 9
37 Pa. Code § 81.211(2)(ii) 15
42 Pa. Cons. Stat. Ann. § 6302 4
42 Pa. Cons. Stat. Ann. § 6355 4
R.I. Gen. Laws § 14-1-7.1 4
S.C. Code § 63-19-1210(6) 4
S.D. Codified Laws § 26-11-4 4
Tenn. Code Ann. § 37-1-134 4
Tex. Fam. Code § 54.02 1
Utah Code Ann. § 76-2-301 1
Va. Code Ann. § 16.1-269.1 1
Wash. Rev. Code § 13.40.110 4
W. Va. Code Ann. § 49-5-10(e) 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* (2007) 3

Meg Laughlin, *Sentenced to Life, Unintentionally*, St. Petersburg Times, Feb. 27, 2009 12

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ARGUMENT

I. FLORIDA'S SUBMISSIONS ON THE MERITS LACK SUBSTANCE.

A. Far from Being Widely Accepted, the Practice of Condemning Young Adolescents to Die in Prison Is Almost Universally Repudiated in This Country.

Neither respondent nor its *amici* dispute that, in actual practice, the imposition of a life-without-parole sentence on a 13- or 14-year-old child is an aberrant, vanishingly rare occurrence. None of the material facts bearing on this point are in contention. Florida does not dispute that only *two* 13-year-olds are currently serving sentences of life without parole in the United States for non-homicide offenses.[1] Although thousands of young adolescents have been charged with serious crimes nationwide and in Florida, Florida is the *one* State to impose this

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[1] In fact, in many States 13-year-old children cannot be prosecuted as adults or subjected to *any* kind of adult sentence. *See, e.g.*, Ala. Code § 12-15-203; Ariz. Rev. Stat. Ann. § 13-501; Ark. Code Ann. § 9-27-318; Cal. Welf. & Inst. Code § 602; Conn. Gen. Stat. Ann. § 46b-127; Iowa Code Ann. § 232.45; Ky. Rev. Stat. Ann. § 635.020; La. Child. Code Ann. art. 857; Mass. Gen. Laws ch. 119, § 74; Minn. Stat. Ann. § 260B.125; N.J. Stat. Ann. § 2A:4A-26; N.M. Stat. Ann. § 32A-2-3, *as amended by* 2009 N.M. Laws 239, § 10 (S.B. 248, approved Apr. 7, 2009, eff. July 1, 2009); N.D. Cent. Code § 12.1-04-01; Ohio Rev. Code Ann. § 2152.10; Tex. Fam. Code § 54.02; Utah Code Ann. § 76-2-301; Va. Code Ann. § 16.1-269.1.

sentence; and even Florida has not actually imposed it on any 13-year-old child for a non-homicide in more than 18 years. Only three additional people in this nation are serving life without parole for a non-homicide offense at age 14 – all also in Florida. Only *six* States have sentenced a 13-year-old to life without parole for any offense, including homicide; only *nine* people nationwide are serving such a sentence for any offense at age 13. Only a minority of States (18) have imposed life-without-parole sentences on children convicted of *any* offense at age 13 or 14. Such a sentence actually has been imposed on just 73 people in this country over the past 30 years or so.

Rather than acknowledge this Court's precedents which analyze actual state practice and find figures like these indicative of a consensus *against* a particular penalty,[2] Florida points to the number of jurisdictions where 13-year-olds may be tried as adults; it notes the statutes in these States authorizing life-without-parole sentences for adult offenders; and it adds the numbers up to assert that there is widespread acceptance of the propriety of sentencing 13-year-olds to lifelong incarceration with no hope for release before death. This argument ignores that the freakish rarity of actual imposition of such sentences, *despite their broad availability on the statute books*, is compelling evidence of contemporary,

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[2] *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (considering "the infrequency of . . . [a penalty's actual] use even where it remains on the books").

nationwide repudiation of life-without-parole for young teens.

Florida endorses the analysis in the Brief for Petitioner showing that life-without-parole is theoretically available for 13-year-olds in 27 jurisdictions.[3] It misreads and miscalculates, but does not disagree with, the data showing that, of more than a quarter-million potential cases, a total of only 73 young adolescents (nine 13-year-olds plus sixty-four 14-year-olds) have been sentenced to life without parole nationwide for any crime over the past three decades or so.[4] While Florida and its *amici* acknowledge that, in this nation of more than 300 million souls, 2, 9, or 73 is a "relatively small number," RB 35, and that

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[3] It also agrees that, for 14-year-olds, the penalty is theoretically available in 40 jurisdictions. Florida cites sources asserting that a larger number of jurisdictions permit life-without-parole sentences for juveniles, but those sources fail to take account of statutes forbidding such sentences for 13- or 14-year-olds. For the age-specific numbers, Florida accepts the analysis in the petitioner's brief. RB 27-28, 32-33, 34.

[4] J.A. 27; Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20 (2007). Florida's misreading produces a mathematically wrong total of "81 (nine plus 73)" rather than 73. RB 34. And in stating that Sullivan's brief has "increased the number of juveniles upwards [from two] to nine who committed serious offenses such as rape and homicide at age thirteen," RB 3, Florida also appears to misunderstand that 2 is the number of 13-year-olds sentenced to life without parole nationwide for non-homicide offenses; 9 is the number of 13-year-olds sentenced to life without parole nationwide for all offenses, including homicide. Obviously, both are infinitesimally small figures; Florida does not refute this.

"imposition of life without parole on juveniles is rare," Nat'l D.A. Ass'n Br. 18; *see also* La. Br. 1-2, 8 ("Such sentences are rare, of course, and should be."), Florida ignores the clear implication of these facts. The refusal of state prosecutors, juries, and judges to actually impose the readily-available penalty of life without parole in more than 2, 9, or 73 cases demonstrates not acceptance but virtually universal *rejection* of the penalty.

Florida also fails to acknowledge that its reliance on nonspecific state legislative enactments alone is particularly tenuous because not one of those enactments expressly endorses the sentencing of 13- and 14-year-old children to life without parole.[5] Respondent and its *amici* do not dispute the fact that no State which has expressly addressed the question of the minimum age of eligibility for a life-without-parole sentence has set the age as low as 13.[6] Indeed, *amicus* Louisiana expressly *prohibits* life-without-parole sentences for children 14 and younger.

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[5] The only arguable exception is Massachusetts. *See* PB 48.

[6] In fact, under respondent's analysis, Florida and 14 other States have "authorized" life without parole for 8- and 9-year-old children, since none of these States sets a minimum age for transfer to adult court. *See* Del. Code Ann. tit. 10, § 1010; Fla. Stat. Ann. § 985.56; Haw. Rev. Stat. Ann. § 571-22(d); Idaho Code Ann. § 20-509(1); Me. Rev. Stat. Ann. tit. 15, § 3101; Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06; Mich. Comp. Laws Ann. § 712A.2d; Neb. Rev. Stat. Ann. § 43-247; 42 Pa. Cons. Stat. Ann. §§ 6302, 6355; R.I. Gen. Laws § 14-1-7.1; S.C. Code § 63-19-1210(6); S.D. Codified Laws § 26-11-4; Tenn. Code Ann. § 37-1-134; Wash. Rev. Code § 13.40.110; W. Va. Code Ann. § 49-5-10(c).

La. Child. Code Ann. art. 857(A)-(B) (minimum age for prosecution as adult is 14, and transferred 14-year-old convicted in adult court must be released before reaching 31 years of age). Florida simply disregards *Thompson*'s[7] teaching that no legislative judgment about the appropriate penalty for a child offender can be inferred from a transfer or waiver statute; and Florida's account of the widespread legislative reaction to the inflated, alarmist juvenile-crime projections of the mid-1990s differs from Joe Sullivan's only in Florida's failure to recognize that the projections proved wildly inaccurate.[8] In any event, its brief offers no evidence that Florida or any other State specifically considered whether a permanent punishment like lifelong imprisonment without parole is appropriate for 13- and 14-year-olds.

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[7] *Thompson v. Oklahoma*, 487 U.S. 815, 829 n.24 (1988) (plurality opinion).

[8] *See* Surgeon General of the United States, *Report: Youth Violence* 5 (2001); *and see generally* Franklin Zimring, *The Great American Crime Decline* (2007).

B. Florida's Claim of Justification for Sentencing "The Worst of the Worst" Among Juvenile Offenders to Lifelong Incarceration Fails Because, as *Roper* Teaches, the Immature and Transient Nature of a Young Adolescent's Personality Precludes a Reliable Judgment That He or She Deserves That Indelible Brand.

Florida does not dispute what *Roper*, the uniform teaching of the medical and scientific community, and hundreds of state and federal laws make clear: Young adolescents' unique vulnerabilities and deficiencies distinguish them from adults and from older teens in ways that are particularly relevant to sentencing. Indeed, Florida admits that "an offender's young age could play into the gross disproportionality analysis for prison sentences," RB 21; that "the states have recognized the differences between juveniles and adults" for sentencing purposes, RB 41; "that juveniles generally lack mature judgment and that their age level matters in many contexts," RB 42; that "society may assign lesser culpability to juveniles as a class," RB 42; "that many juvenile acts are not suitable for 'adult' treatment," RB 43; and that, by national consensus, "only the worst juvenile offenders are treated as adults for purposes of charging, adjudication, and sentencing," RB 38. Thus Florida agrees, as it must, with *Roper*'s determination that children categorically possess unique characteristics – diminished responsibility and culpability; heightened susceptibility to external influences; and unfinished, incomplete personal identity and character – which

must be taken into account in sentencing; and Florida agrees that life-without-parole sentencing must be reserved for a small subset comprised of "only the worst juvenile offenders." RB 38; *see also* Nat'l D.A. Ass'n Br. 19 ("This rarity simply confirms that prosecutors and courts have used their guided discretion to confine application of this severe sanction to the most severe offenses and hardened juvenile offenders.").

Where Florida goes wrong – and falls afoul of *Roper* – is that it contends that these "worst of the worst" juvenile offenders – those whose culpability, dangerousness, and irretrievable depravity would justify permanent incarceration – can be accurately identified while they are still children.[9] And it compounds this error by suggesting that the necessary identification is performed by the determination that a child should be tried in adult court. RB 21-22. *Roper* explains that it is impossible to distinguish accurately the small number of children who will not reform from the vast majority of children who will mature and one day be fit to return to society. The clear consensus of the scientific community[10] – as well

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[9] To justify Joe Sullivan's sentence to die in prison, Florida argues that "Sullivan's crime was so serious that an inference can be drawn that [at age 13] he intended to commit these heinous acts with knowledge of their seriousness." RB 24; *see also* RB 25 (some crimes are "sufficiently horrific" that we "can conclude that a juvenile offender was sufficiently mature to commit those crimes with adult intent").

[10] Florida's *amici* attempt to undermine this consensus by suggesting that neurological studies using fMRI scanning

(Continued on following page)

as that of educators, correctional professionals, and faith communities – is that no reliable procedure or instrument exists to enable even mental health experts specifically trained in child development to identify unredeemably incorrigible young adolescents. *See* Am. Psych. Ass'n et al. Br. 21; Aber et al. Br. 31; Juv. Corr. Adm'rs Br. 31-33. To expect that prosecutors or judges can do this reliably is to indulge a fantasy. That is why *Roper* flatly rejected – and warned of the problems inherent in – the notion that the few incorrigible juvenile offenders can be accurately identified.

This Court has recognized that even the in-depth, far-ranging examination of an offender's background which is constitutionally required in capital cases could not produce a reliable permanent judgment about the incomplete person that a young adolescent represents. *Roper*, 543 U.S. at 572-573. It blinks reality to suggest, as Florida argues at length, that this judgment can be accurately made (or sensibly attempted, for that matter) through the determination – often an informal, unreviewable, unilateral decision by a prosecutor – to try a child in adult court. Even when a juvenile court judge makes this determination, he or

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technology to show the general developmental trajectory of different areas of the brain are unreliable because of methodological problems with fMRI studies in general (Ctr. Const. Juris. Br. 7-10). Notably, none of the studies relied on by petitioner or any of his *amici* is implicated in this critique. Still more notably, not a single medical, developmental, or mental-health professional signed on to any of Florida's *amici*'s briefs.

she considers only whether the resources of the juvenile justice system are adequate to deal with the child in the near future, not whether the child will be forever unfit to reenter society.

The model transfer provision presented by *amicus* Louisiana is a good example. It directs the court to consider whether "rehabilitation of the child will not occur in the juvenile system," whether there is adequate security available in the juvenile system, and whether there is "sufficient time to rehabilitate the child within the juvenile system." La. Br. 37. These factors address whether the child can be rehabilitated before age 21,[11] not whether he or she will *ever* be rehabilitated.

Similarly, where Florida law instructs the juvenile court to determine whether a child should be transferred to adult court, it directs the juvenile judge to consider the "prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child . . . by the use of procedures, services, and facilities currently available to the [juvenile] court." Fla. Stat. Ann. § 985.556(4)(c)(8). Those procedures, services, and facilities are coextensive with the juvenile court's jurisdiction, which expires when the child reaches age 22. Fla. Stat. Ann.

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[11] Ohio Rev. Code Ann. § 2152.02(6) (juvenile court has jurisdiction until age 21). It is worth noting that 13-year-olds cannot be tried as adults in Ohio. *Id.* § 2152.10 (minimum age for transfer to adult court is 14).

§ 985.0301(5)(d)-(e). A decision that a child should remain in custody past his or her 18th or 21st birthday cannot rationally substitute for, or support, an inference that he or she will never be safe to release from incarceration – not even decades later. *See Thompson*, 487 U.S. at 829 n.24 (plurality opinion) (that some States had "set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders*" [emphasis in original]).

Joe Sullivan's case provides a dramatic example of the fallacy of the claim by Florida and its *amici* that a decision to prosecute a child as an adult can stand in for the judgment that he or she is forever incorrigible and irretrievable. Joe was indicted directly in adult court. J.A. 1. There was no transfer or waiver proceeding to determine whether he should be tried in adult court, much less to determine whether he will ever be fit to return to society.[12] Contrary to Florida's assertion that the trial judge properly accounted for Joe's age, background, and potential for rehabilitation, the sentencing judge's comments show only that he believed that Joe

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[12] *See* Fla. Stat. Ann. § 985.56(1) (former § 39.02) (when "indictment is returned . . . the child must be tried and handled in every respect as an adult").

Sullivan required something more than a short juvenile sentence – not that Joe would be incapable of ever reentering society. Tr. III 268. Assuming *arguendo* that the sentencing court reliably determined – based on a single adjudication prior to Joe's arrest for this offense and a term of less than nine months in a structured facility – that 13-year-old Joe Sullivan was beyond the capacity of the juvenile system to help, control, or correct, that determination cannot plausibly be understood as a judgment that Joe is "the worst of the worst" among juvenile offenders, who will never be capable of living in free society. Nor, if the determination were so understood or intended, could it be defended for one moment consistently with reason or with *Roper*.

C. Requiring States to Make the Determination About an Offender's Fitness to Rejoin Society at a Time in the Course of the Individual's Development When That Determination Can Be Made with Some Accuracy Will Not Unleash a Juvenile Crime Wave or Impose an Impractical Burden on Criminal Justice Systems.

Florida asserts – without any data or empirical evidence to support it – that "enhanced penalties against juveniles, such as Sullivan, . . . have deterred others from such conduct over the past decade." RB 35. There is no basis in reality for this claim. To appreciate what Florida is arguing, one needs only

make its point explicit: It is that the tidal wave of juvenile crime predicted by the now-discredited alarmism of the mid-90s would have flooded the nation if it had not been held back nationwide by the successful deterrent tactics of a minority of States, like Florida, which collectively have put a total of seventy-three 13- and 14-year-olds in prison for the remainder of their natural lives, never to be considered for parole.[13]

There exists no credible argument, much less evidence, that 13-year-olds are sufficiently aware of criminal sentencing provisions or that they have sufficiently mature judgment or foresight to regulate their behavior in consideration of legislation (almost never used, at that) authorizing life-without-parole sentences.[14] Florida offers no rebuttal to *Roper*'s finding that there is an "absence of evidence of deterrent effect," 543 U.S. at 571; *see also id.* ("[T]he same characteristics that render juveniles less

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[13] For what is actually known on the subject, *see* the authorities in note 8 *supra* and those they cite; *see also* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence, IRS Working Paper # 550* (2009), http://www.irs.princeton.edu/faculty/wp.php.

[14] Interestingly, at least one criminal trial judge who imposed a life-without-parole sentence on a child in Florida did not know that life without parole could be imposed on children. *See, e.g.*, Meg Laughlin, *Sentenced to Life, Unintentionally*, St. Petersburg Times, Feb. 27, 2009 (Florida trial judge who sentenced 14-year-old to life without parole for non-homicide told reporter, "I didn't think when I gave Kenneth Young life that it was life without parole.").

culpable than adults suggest as well that juveniles will be less susceptible to deterrence."); *Thompson*, 487 U.S. at 837 (plurality opinion) ("The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."); nor does Florida attempt to explain how life without parole deters indisputably less mature 13-year-olds when the death penalty does not deter 17-year-olds.[15] And the plain fact is that no 13-year-old has been sentenced to life without parole for a non-homicide offense in the United States for more than 18 years now. Obviously, the elimination of that sentence from the realm of possibility will be inconsequential for crime policy.

Florida's argument that a constitutional ruling invalidating Joe Sullivan's life-without-parole sentence would require "the reconstitution of parole boards," mandate expensive state programs, and ultimately prove "unworkable," RB 47-49, is another

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[15] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 66-69 (2009) (summarizing numerous studies finding lack of deterrent effect of harsh juvenile sentencing, including one based on Florida's direct file provision, and concluding that research indicates that "exposing [adolescents] to especially harsh sanctions does little to deter offending"); Laurence Steinberg, Sandra Graham et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 29 (2009) (noting study finding that "younger adolescents (11- to 13-year-olds) were significantly less likely to recognize the long-term consequences of various decisions than were adolescents 16 and older").

scarecrow. It overlooks the fact that every affected State, including Florida, currently has a functioning parole board;[16] it confuses Joe Sullivan's modest plea for review with a demand for an affirmative right to release; and it underestimates the States' proven ability to comply with this Court's constitutional rules.[17]

A ruling for Joe Sullivan would not invalidate a single state law. It would merely curb the marginal application of a seldom-used sentencing option by requiring jurisdictions which theoretically authorize – but almost never use – life-without-parole sentences for young adolescents to provide some form of review of the adolescent's later fitness for release in the rare cases where such review is not now afforded. Florida itself would not be required to relinquish custodial control over the handful of juvenile offenders whom it presently imprisons for the whole of their natural

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[16] In all States that currently have people sentenced to death in prison for crimes at 13 or 14, there exists a functioning parole board. *See* App. A.

[17] For example, when this Court held in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that States could not constitutionally detain arrested persons for prolonged periods with no pretrial opportunity for a probable cause determination, it "recognize[d] that state systems of criminal procedure vary widely" and refrained from dictating a "single preferred pretrial procedure." *Id.* at 123. The States responded in various ways, some relying on their existing preliminary-hearing process, others authorizing new forms of adversarial hearings or procedures for magisterial review of post-arrest affidavits, to satisfy *Gerstein*'s requirements.

lives without such review. It could, as many jurisdictions do, subject them to sentences of life imprisonment *with* the possibility of parole.[18] And in the States that, like Florida, have abolished parole for all offenses occurring after a certain date, parole boards still operate to provide periodic review to offenders who were sentenced for parole-eligible offenses before that date.[19] The handful of juveniles affected by a ruling in this case could without much ado be added to that cohort.

II. FLORIDA'S DEPICTION OF JOE SULLIVAN AND HIS CASE IS A DISTORTION.

Because the only case-specific facts relevant to Joe Sullivan's constitutional contention are his age of 13 and the non-homicidal nature of his conviction, the Brief for Petitioner did not describe the distressing circumstances of his life and the disturbing features of his prosecution. Florida's brief has stepped into this vacuum with a misleading portrait which we feel obliged to correct.[20] Examination of the record of Joe's

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[18] *See, e.g.*, Ala. Code § 15-22-28(e); Colo. Rev. Stat. Ann. § 18-1.3-401(4)(b); Iowa Code Ann. §§ 901A.2(6), 903B.1, *as amended by* 2009 Iowa Legis. Serv. 119 (West) (S.F. 340, approved May 21, 2009); Mich. Comp. Laws Ann. § 791.234(7); Miss. Code Ann. § 47-7-3(1); Mo. Ann. Stat. § 558.019(4); Neb. Rev. Stat. Ann. §§ 29-2204(1)(a)(ii) & 83-1,110(1); 37 Pa. Code § 81.211(2)(ii).

[19] *See* App. A.

[20] Florida draws its facts from proceedings at Joe Sullivan's trial and sentencing which it acknowledges were not a part of

(Continued on following page)

trial reveals facts and proceedings that make his sentence particularly indefensible and highlight the dangers of justice miscarrying when young adolescents can be prematurely, terminally adjudicated fit only to die in prison.

At the time of his arrest in 1989, Joe Sullivan was a 13-year-old boy with intellectual impairments who read at a first-grade level, had experienced repeated physical abuse by his father, and was severely neglected. J.A. 26, 36; Present. 7. His family had disintegrated into what state officials described as "abuse and chaos." Present. 7. From age ten until his arrest for this offense, Joe had no stable home; he had no less than ten different addresses within this

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the record before the courts below in the present case. RB 4 n.1. This Court generally does not consider facts outside the record below because it "must affirm or reverse upon the case as it appears in the record." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 n.3 (1986). Joe's state postconviction motion was dismissed without an evidentiary hearing; Florida law therefore required the state appellate court to accept his factual allegations as true to the extent they were not refuted by the record. *Floyd v. State*, 808 So. 2d 175, 182 (Fla. 2002). Petitioner's merits brief relied exclusively on the facts in the state postconviction record, which were and are sufficient for this Court to adjudicate his claims. However, in order to respond to Florida's allegations about his background, trial, and sentence, he is now obliged to refer also to the trial record, including the presentence reports. These have been proposed for lodging with this Court pursuant to its Rule 32. The presentence investigation report dated December 4, 1989, will be referred to as "Present." and the predisposition report dated December 11, 1989, will be referred to as "Predisp."

three-year period. Present. 7. He spent most of his time on the streets, where police stopped him for violations including trespassing, stealing a bike, and property crimes committed with his older brother and other older teens. Predisp. 1-3. Twelve resulting misdemeanor-level violations make up the bulk of his juvenile history. Tr. III 285. During this period, Joe was brought to court and adjudicated on a *single* occasion, when he was 12 years old. Predisp. 1-3.

Joe's most serious prior offense occurred when, at age 12, he followed his older brother in breaking into a house. They were unexpectedly set upon by a dog, and Joe fatally struck the dog. Predisp. 2. This one incident accounted for nearly two-thirds of the criminal history points assessed at Joe's sentencing. Predisp. 2; Tr. III 285.[21]

Florida's supporters contend that Joe "had also proven himself unamenable to juvenile rehabilitation, having seriously assaulted one of his juvenile counselors." Nat'l D.A. Ass'n Br. 20-21; *see also* RB 6. This "serious assault" was an unwanted touching that

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[21] Florida and its supporters significantly overstate Joe's juvenile history. The National District Attorney's Association twice asserts, without citation, that Joe had "seventeen prior serious felonies." Br. 20, 21. This is demonstrably false. Twelve of Joe's 17 juvenile adjudications were for misdemeanor violations; four were offenses that would be third-degree felonies (the lowest degree of felony under Florida law [Fla. Stat. Ann. § 775.081]) if committed by an adult. Tr. III 285. Thus, Florida's assertion that Joe had "several serious felonies," RB 6 – much less 17 – is a blatant misstatement of the record facts.

took place when Joe, at age 11, was at a shopping mall with other children and touched his school counselor on the buttocks, causing no injury. Predisp. 1.

Joe's record of mostly misdemeanor-level juvenile incidents – nearly all of which are non-violent and which did not merit more than a single court adjudication in a two-year period – does not support the conclusion that "'the juvenile system has been utterly incapable of doing anything with Mr. Sullivan,' even though Sullivan had been 'given opportunity after opportunity to upright himself and take advantage of the second and third chances he's been given.'" RB 6 (quoting the sentencing judge). It belies reason to suggest that the juvenile system's capacity to "do anything with" Joe Sullivan was exhausted by a single adjudication and brief commitment for several months to juvenile detention. Predisp. 1-4. The fact is that Joe was given no second, much less a third, chance to "upright himself": his second-ever adjudicatory court appearance was at 13 years old when he was indicted to stand trial as an adult for the instant offense.[22]

Joe's pre-teen behavior demonstrates his heightened susceptibility, as an intellectually impaired child, to engage in inappropriate behavior while following his older brother and other teens. The

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[22] Joe was adjudicated a second time for the remaining juvenile violations while in custody awaiting trial on this offense. Predisp. 2-3.

juvenile probation officer assigned to Joe's current case observed his behavior was attributed to the fact that "he is easily influenced and associates with the wrong crowd." Predisp. 4. She noted that "[i]t is apparent that Joe is a very immature naive person who is a follower rather than a leader," and that he has the potential to "be a positive and productive individual." Predisp. 4. His prior history was exactly the type of minor misbehavior in which young adolescent boys participate and then leave behind as they grow up and mature.[23] While it is appropriate and necessary to hold young children accountable for these types of misdeeds, it is wholly inaccurate and a gross exaggeration to suggest that Joe's juvenile behavior makes him a "serial" or "violent recidivist," Nat'l D.A. Ass'n Br. 20-21, who will never be fit to reenter society.

The circumstances of the offense for which Joe was sentenced to die in prison underscore his vulnerability to the negative influences of older people. On the morning of May 4, 1989, two older boys, Michael Gulley, 15, and Nathan McCants, 17,[24] enlisted Joe to

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[23] *See* PB 19-22; Aber et al. Br. 13-25; Am. Psych. Ass'n et al. Br. 7-22; *see also* Former Juv. Offenders Br. 11-13 (describing much more serious offenses committed by Senator Alan Simpson as a juvenile, when he and his peers torched a federal building, shot up their community, and killed a cow; Senator Simpson's turning point came after he was arrested for assaulting a police officer).

[24] Co-defendants' age and race information is from the Florida Department of Corrections Web site, at http://www.dc.state.fl.us/InmateReleases.

accompany them to break into an empty house. J.A. 26, 36. The three boys entered the home of Lena Bruner in the morning while no one was there. J.A. 26, 36. McCants took some money and jewelry. J.A. 26, 36. The three boys then left. J.A. 26, 36. That afternoon, Ms. Bruner was sexually assaulted in her home. J.A. 26, 36. She never saw her attacker. J.A. 26, 36. She could describe him only as "quite a dark colored boy" with "curly type hair." Tr. I 76. Gulley, McCants, and Sullivan all are African American.

Within minutes of the assault, Gulley and McCants were apprehended nearby, together. Tr. I 124, 142, 166. McCants had the victim's jewelry on him. Tr. I 124. Facing serious felony charges, Gulley – who had an extensive criminal history involving at least one sexual offense, Tr. IV, State's Ex. C 38-41[25] – accused Joe of the sexual battery. J.A. 26, 36. Joe was not apprehended on the day of the crime, but spoke to police the next day. *See* Tr. II 197, 203. The prosecutor chose to indict 13-year-old Joe Sullivan in adult court for sexual battery and other charges. Tr. III 256-257. The grand jury that convened to determine whether there was probable cause to believe that Joe committed the offense had no authority or occasion to consider whether Joe should be tried in adult court, and there was no transfer or waiver proceeding to

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[25] Gulley's deposition also revealed that both he and McCants previously had been sexually active. Tr. IV, State's Ex. C 8-9.

determine the appropriateness of trying, much less sentencing, Joe as an adult.[26]

Joe was tried by a six-person jury in a one-day proceeding; opening statements began sometime after 9 a.m., and the jury returned its verdict at 4:55 p.m. Tr. I 30-31; Tr. II 250. Joe's appointed counsel was later suspended from practice in Florida and never reinstated.[27]

At trial, Joe admitted his participation in the earlier burglary but denied that he committed sexual battery. Tr. II 193-194. The prosecution's evidence purporting to identify Joe as the perpetrator of the sexual assault was far from overwhelming. The prosecution relied primarily on the self-serving stories of McCants and Gulley, including Gulley's claim that Joe confessed the rape to him in a detention facility before trial. Tr. I 167-168. After implicating Joe, both

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[26] Under Florida law, the grand jury's role is that of an investigative and accusatorial body required to present every offense against the penal laws of the state without regard for the available punishment, *Owens v. State*, 59 So. 2d 254, 256 (Fla. 1952); *see also In re Jury Instructions in Criminal Cases*, 911 So. 2d 766, 786 (Fla. 2005) (grand jury must be instructed, "Your duty is only to ascertain whether there is 'probable cause' a crime has been committed by the person so accused.").

[27] *See Fla. Bar v. Plant*, 698 So. 2d 1226 (Fla. 1997) (table) (inactive status); *Fla. Bar v. Plant*, 699 So. 2d 1376 (Fla. 1997) (table) (public reprimand); *Fla. Bar, In re Plant*, 728 So. 2d 205 (Fla. 1998) (table) (reinstatement denied); *Fla. Bar v. Plant*, 848 So. 2d 1156 (Fla. 2003) (table) (suspended); *see also* Florida Bar Online, http://www.floridabar.org/ (click "Find a Lawyer" and search last name: Plant; first name: Mack).

Gulley and McCants received very short sentences for their roles in the crime. McCants was sentenced as an adult to four-and-one-half years and served six months.[28] Gulley, despite admitting his involvement in some 20 prior burglaries and a prior sex crime, was sentenced as a juvenile. Tr. IV, State's Ex. C 4, 30-41.

The only physical evidence adduced to implicate Joe was a latent partial palm-print that the State's examiner testified matched his. Tr. I 183-184. This was consistent with Joe's admitted presence in the bedroom during the morning prior to the rape. Tr. II 201. The State collected biological evidence but did not present it in court, and then destroyed it before it could be tested by the defense. J.A. 26, 36. The prosecution also presented testimony from a police officer who got a "glimpse" of an African-American youth running from the victim's house, observed Joe Sullivan at the police station being interrogated as the suspect in the sexual assault, and under these highly suggestive circumstances, identified Joe as the fleeing youth.[29] Tr. I 118, 120; Tr. IV, State's Ex. B 24.

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[28] Sentence and release information from http://www.dc.state.fl.us/InmateReleases (search first name: Nathan; last name: McCants) (shows sentence of 4.5 years for burglary committed on May 4, 1989, and in custody from April 26, 1990, to October 4, 1990).

[29] Florida implies that a neighbor identified Joe. RB 5. The victim's neighbor testified that she saw "two young black males" outside the victim's house, Tr. I 51, but she did not recognize Joe Sullivan as being one of them. Tr. I 56-57.

Finally, the prosecution presented testimony from the victim who, despite being coached through a rehearsal of her testimony outside the presence of the jury,[30] could not affirmatively identify Joe Sullivan as the perpetrator, testifying only that Joe's voice "could very easily be" that of the perpetrator. Tr. I 91. The prosecutor during closing argument acknowledged uncertainty about whether Joe actually committed the assault but nonetheless urged the jury to convict him as the assailant or as an accomplice. Tr. II 219-220. Joe was convicted. J.A. 60-61.

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Witness:	It sounds – there's a tone in your voice that's just like that, only you said it very loud to me that time in a belligerent way.
Prosecutor:	I don't want to argue about it. Are you able to say that's the voice of the person?
Witness:	There's a tone in that voice that makes me know it's that person.
Prosecutor:	So you are saying the person who just spoke to you is the person that said that to you that day?
Witness:	**It sounds like the voice.**
Prosecutor:	All right.
Witness:	It's been six months. **It's hard, but it does sound similar.** But it's said in a different way. See, the tone – it was said to me very belligerent in a loud voice.

Tr. I 86-88 (emphasis added).

His appointed lawyer filed no written pleadings and uttered no more than 12 transcript lines at sentencing. Tr. III 267. Despite numerous potentially meritorious grounds for appeal, Joe's appointed appellate counsel notified the court that he could find no issues worth raising and withdrew.[31] Joe, then 14, was thus denied any meaningful opportunity for review of his conviction. In 2007, present counsel agreed to help Joe and attempted to prove his innocence through a motion for DNA testing. The motion was denied after a hearing because the State had destroyed the relevant biological evidence. J.A. 26, 36.

III. FLORIDA'S OBJECTIONS TO THIS COURT'S JURISDICTION ARE UNFOUNDED.

Florida argues that the Court lacks jurisdiction because the ruling below is based upon an independent and adequate state-law ground. This rehash of the argument made in the State's Brief in Opposition to *certiorari* has gained no added force since we answered it in our reply. *See* Pet. Reply Brief in Support of Cert. 1, 9-11; *see also* Cert. Pet'n 10-18. In short, there exists no obstacle to this Court's jurisdiction because the state procedural ground of decision which Florida seeks to invoke as a bar was dependent upon the Florida postconviction courts' anterior consideration and rejection of the precise

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[31] *See* PB 2.

federal constitutional claim upon which this Court has now granted *certiorari*.

As it did before, Florida relies on the circuit court's statement that Joe Sullivan's Eighth Amendment claim was "procedurally barred." RB 8. The state court reached this conclusion, however, only *after* determining that "Defendant d[id] not have a valid [federal] constitutional claim." J.A. 58. In circumstances like these – where invocation of a state-law bar depends on an antecedent analysis of the federal right claimed – this Court has jurisdiction to review the claim of federal right. *See, e.g.*, *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam) (citing the relevant precedents and reaffirming "that 'this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law' ") (citation omitted); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388 (1986) ("If the . . . procedural ruling under state law implicates an underlying question of federal law, . . . the state law is not an independent and adequate state ground supporting the judgment."); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (holding that where "the State has made application of the procedural bar depend on an antecedent ruling on federal law . . . the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded").

Here, petitioner contended in the courts below, exactly as he does in this Court, that a proper reading of the Court's decision in *Roper v. Simmons* rendered

his life-without-parole sentence federally unconstitutional and thereby brought his case within an exception to the State's postconviction statute of limitations. The state postconviction court responded to this contention by examining *Roper*, concluding that petitioner had no "valid constitutional claim" because his argument based on *Roper* was "meritless," and accordingly holding that the exception to the statute of limitations was inapplicable. *See* J.A. 58-59. The state-law procedural-bar ruling depended squarely on a determination that *Roper* "did not establish" the federal constitutional right claimed by petitioner.[32] It was thus the very antithesis of an *independent* state-law ground of decision. *See Ake*, 470 U.S. at 75.

That alone is sufficient to establish this Court's jurisdiction. But there is a further reason to conclude that the state postconviction court's ruling was not independent but was driven by its view of federal law. This arises from the standard conventions of Florida's noncapital postconviction practice, under which – notwithstanding Florida Rule of Criminal Procedure 3.850(b)'s two-year time limitation with its enumerated exceptions – a postconviction court

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[32] Florida conceded this in its BIO: "In his state motion, petitioner asserted that *Roper* established a new constitutional right that juveniles could not be sentenced to life in prison. The state court examined *Roper*, and how courts had interpreted *Roper*, and determined that *Roper* did not establish the constitutional right asserted. Based on this determination, the court then dismissed the post conviction motion because it was procedurally barred." Resp. BIO 9.

retains the power to correct an illegal sentence "at any time."[33]

Florida's brief minimizes this exception by relegating it to a footnote and citing a 1984 intermediate appellate court decision that appears to sharply limit its scope. RB 12 n.5 (citing *Wahl v. State*, 460 So. 2d 579 (Fla. 2d Dist. Ct. App. 1984)). In reality, however, the exception has been the subject of

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[33] Rule 3.850(b) states: "A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time." Rule 3.800(a) states: "A court may at any time correct an illegal sentence imposed by it . . . when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief. . . ." The slightly different language of these two provisions is interpreted in tandem as requiring that "an illegal sentence . . . must be corrected." *Summers v. State*, 747 So. 2d 987, 989 (Fla. 5th Dist. Ct. App. 1999) (granting relief under Rule 3.850 beyond two-year limitation period where sentence based on erroneous habitual offender classification). Also, to the extent that there is any difference between the two rules in this regard, Florida courts are required, *sua sponte*, to treat a claim filed under the wrong rule as filed under the right one. *See, e.g.*, *Parker v. State*, 987 So. 2d 177, 178 (Fla. 1st Dist. Ct. App. 2008) (per curiam) (reversing summary denial of Rule 3.850 claim as untimely and remanding for trial court to treat claim that written judgment varied from oral pronouncement of sentence as claim of illegal sentence under Rule 3.800(a) and resolve it on merits); *Young v. State*, 619 So. 2d 378, 379 (Fla. 2d Dist. Ct. App. 1993) (per curiam) (remanding because trial court should have considered motion filed under Rule 3.850 as one under Rule 3.800(a) and noting, "While one might question why it took Young eighteen years to discover such a claim, a motion seeking correction of an illegal sentence may be filed at any time.").

repeated analysis by the Florida Supreme Court[34] and has been held to include a wide array of constitutional and statutory sentencing infirmities. The exception has been applied, for example, to reach the merits of claims of double jeopardy, *Apprendi* error, various errors of state law, and Eighth Amendment error, making all of these claims raisable and correctable at any time.[35]

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[34] The Florida Supreme Court has addressed the "illegal sentence" exception in a series of decisions stretching back to the mid-1980s. *See Saintelien v. State*, 990 So. 2d 494 (Fla. 2008); *Williams v. State*, 957 So. 2d 600 (Fla. 2007); *Wright v. State*, 911 So. 2d 81 (Fla. 2005); *Bover v. State*, 797 So. 2d 1246 (Fla. 2001); *Carter v. State*, 786 So. 2d 1173 (Fla. 2001); *Maddox v. State*, 760 So. 2d 89 (Fla. 2000); *Dixon v. State*, 730 So. 2d 265 (Fla. 1999); *Hopping v. State*, 708 So. 2d 263 (Fla. 1998); *State v. Mancino*, 714 So. 2d 429 (Fla. 1998); *State v. Callaway*, 658 So. 2d 983 (Fla. 1995); *Davis v. State*, 661 So. 2d 1193 (Fla. 1995); *State v. Whitfield*, 487 So. 2d 1045 (Fla. 1986).

[35] *See, e.g.*, *Deering v. State*, 988 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 2008) (per curiam) (rejecting on merits claim that Eighth Amendment rendered life sentence for 1977 robbery an "illegal sentence"), *review denied*, 11 So. 3d 942 (Fla. 2009); *Pfoutz v. State*, 910 So. 2d 946 (Fla. 5th Dist. Ct. App. 2005) (denying on merits claim that sentence was illegal under state analog to Eighth Amendment). *Cf. Hopping*, 708 So. 2d at 265 ("[W]here it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800."); *Hughes v. State*, 826 So. 2d 1070, 1072 (Fla. 1st Dist. Ct. App. 2002) (per curiam) ("We note initially that rule 3.800(a) is an appropriate procedural vehicle for raising an *Apprendi* claim, since such a violation would produce a sentence in excess of constitutional and statutory maximums and would be apparent from the face of the record.").

In sum, the Florida judiciary has preserved for defendants, even decades after sentencing and direct review, procedures for challenging fundamental constitutional and statutory infirmities in their sentences. *See Carter v. State*, 786 So. 2d 1173, 1178 (Fla. 2001) ("We continue to refine our definition of 'illegal sentence' in an attempt to strike the proper balance between concerns for finality and concerns for fundamental fairness in sentencing."). Under Florida law, if the state courts had believed that Joe Sullivan's sentence violated the federal Constitution as interpreted in *Roper*, they were empowered to grant him relief. Consequently, the postconviction court's decision to apply a procedural bar doubtless rests squarely on its ruling that Joe Sullivan's sentence does not violate the federal Constitution.

CONCLUSION

There is no obstacle to this Court's jurisdiction and no substance to Florida's arguments on the merits. The Court should invalidate Joe Sullivan's sentence of life imprisonment without the possibility of parole as a cruel and unusual punishment forbidden by the Eighth Amendment.

Respectfully submitted,

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APPENDIX A*

ALABAMA

Ala. Code §§ 15-22-20 to -40 (defining role and duties of Board of Pardons and Paroles); Alabama Board of Pardons and Paroles, http://www.pardons.state.al.us/.

ARIZONA

Ariz. Rev. Stat. Ann. §§ 31-401 to -417 (defining role and duties of Board of Executive Clemency, which include consideration of parole applications); Arizona Board of Executive Clemency, http://www.azboec.gov/.

ARKANSAS

Ark. Code Ann. §§ 16-93-201 to -211 (defining role and duties of Parole Board); *id.* § 12-28-104 (establishing paroling authority); Arkansas Parole Board, http://www.arbop.org/.

COLORADO

Colo. Rev. Stat. Ann. §§ 17-2-201 to -217 (defining role and duties of Board of Parole); Colorado Department of Corrections, http://www.doc.state.co.us/ (select "Operations" menu, click on "Parole and Community").

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* All statutes are current per Westlaw as of October 12, 2009. All Web sites were last visited on October 12, 2009.

DELAWARE

Del. Code Ann. tit. 11, §§ 4341 to 4354 (defining role and duties of Board of Parole); Delaware Board of Parole, http://www.state.de.us/parole/.

FLORIDA

Fla. Stat. Ann. §§ 947.01 to .27 (defining role and duties of Parole Commission); Florida Parole Commission, https://fpc.state.fl.us/.

ILLINOIS

730 Ill. Comp. Stat. Ann. 5/3-3-1 to 5/3-3-13 (defining role and duties of Prisoner Review Board); Illinois Prisoner Review Board, http://www.state.il.us/prb/.

IOWA

Iowa Code Ann. §§ 904A.1 to A.6, 906.1 to .19 (defining role and duties of Board of Parole); Iowa Board of Parole, http://www.bop.state.ia.us/.

MICHIGAN

Mich. Comp. Laws Ann. §§ 791.231 to .246 (defining role and duties of Parole Board); *id.* § 791.034 (creating Michigan Parole and Commutation Board and transferring to it all powers of former Parole Board) (codifying Executive Reorganization Order No. 2009-3, eff. Apr. 19, 2009); Michigan Department of Corrections, http://www.michigan.gov/corrections/ (click on "Probation, Parole & CDP").

MISSISSIPPI

Miss. Code Ann. §§ 47-7-1 to -27 (defining role and duties of Parole Board); Mississippi Parole Board, http://www.mpb.state.ms.us/.

MISSOURI

Mo. Ann. Stat. §§ 217.650 to .735 (defining role and duties of Board of Probation and Parole); Missouri Department of Corrections, http://www.doc.mo.gov/ (click on "Probation & Parole").

NEBRASKA

Neb. Const. art. IV, § 13; Neb. Rev. Stat. Ann. §§ 83-188 to 83-1,125 (defining role and duties of Board of Parole); Nebraska Board of Parole, http://www.parole.state.ne.us/.

NORTH CAROLINA

N.C. Gen. Stat. Ann. §§ 143B-266 to -267 (defining role and duties of Post-Release Supervision and Parole Commission); North Carolina Post-Release Supervision and Parole Commission, http://www.doc.state.nc.us/parole/.

PENNSYLVANIA

61 Pa. Cons. Stat. §§ 6101 to 6153 (defining role and duties of Board of Probation and Parole) (as codified by 2009 Pa. Legis. Serv. 2009-33, S.B. 112, approved Aug. 11, 2009, eff. Oct. 13, 2009); Pennsylvania Board of Probation and Parole, http://www.pbpp.state.pa.us/.

SOUTH DAKOTA

S.D. Codified Laws §§ 24-13-1 to 24-15A-44 (defining role and duties of Board of Pardons and Paroles); South Dakota Board of Pardons and Paroles, http://doc.sd.gov/parole/.

TENNESSEE

Tenn. Code Ann. §§ 40-28-101 to -130 (defining role and duties of Board of Probation and Parole); Tennessee Board of Probation and Parole, http://www.tn.gov/bopp/.

WASHINGTON

Wash. Rev. Code Ann. §§ 9.95.001 to .900 (defining role and duties of Indeterminate Sentence Review Board); Washington Indeterminate Sentence Review Board, http://www.srb.wa.gov/.

WISCONSIN

Wis. Stat. Ann. §§ 15.145, 304.01 to .071 (defining role and duties of Parole Commission), *as amended by* 2009 Wis. Sess. Laws 28, §§ 34, 2742 to 2772 (A.B. 75, approved June 29, 2009, eff. Oct. 1, 2009) (renaming Parole Commission "Earned Release Review Commission" and altering commission's duties); Wisconsin Parole Commission, http://www.wi-doc.com/Parole_Commission.htm.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 2 3 2009
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No. 08-7412, No. 08-7621

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs of Certiorari
To The District Court of Appeal,
First District, State Of Florida

BRIEF OF *AMICI CURIAE* J. LAWRENCE ABER, MARC S. ATKINS, CAMILLA P. BENBOW, MARY M. BRABECK, JEROME BRUNER, HARDIN L.K. COLEMAN, JANE C. CONOLEY, KENNETH A. DODGE, MICHELLE FINE, DOUGLAS FUCHS, LYNN S. FUCHS, FRANCES M. JENSEN, BRINTON LYKES, JACQUELINE MATTIS, PEDRO NOGUERA, ISAAC PRILLELTENSKY & NIOBE WAY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. SCIENTIFIC AND ACADEMIC RESEARCH CONTINUES TO CONFIRM POST-*ROPER* THAT ADOLESCENTS ARE CATEGORICALLY LESS MATURE AND MORE PRONE TO ENGAGE IN RISKY BEHAVIORS THAN ADULTS. 12

A. Adolescents Engage in Risky Behavior. 13

B. Adolescents Take More Risks in Part Due to Differences in Neurological Development. 14

II. THE ADOLESCENT BRAIN IS PLASTIC, RENDERING ADOLESCENTS HIGHLY SUSCEPTIBLE TO OUTSIDE INFLUENCES (INCLUDING PEER PRESSURE AND ENVIRONMENTAL STRESSES) YET CAPABLE OF ENORMOUS CHANGE THROUGH REHABILITATION 22

A. Adolescents Are Unusually Susceptible to Peer Influence 22

B. Adolescents Are Highly Influenced by — and Live at the Mercy of — Psychosocial Conditions, Socio-Economic Variables, and Other Environmental Factors. 25

C. Rehabilitation in Adolescents Is Highly Effective. 28

III. ADOLESCENTS ARE FAR LESS CAPABLE THAN ADULTS TO AID IN THEIR DEFENSE BEFORE AND DURING TRIAL.. 31

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES:

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are an interdisciplinary group of psychologists, social scientists, and neuroscientists who have devoted their careers to the study of adolescent development and behavior. *Amici* respectfully submit this Brief to bring to the attention of the Court the overwhelming body of academic and professional literature and scientific evidence demonstrating — consistent with everyday experience and common sense — that an adolescent is fundamentally different in critical respects than he or she will be at the age of maturity and beyond. Although adolescents must be held responsible for their actions, they generally lack mature decisionmaking capability, have an inflated appetite for risk, are prone to influence by peers, and do not accurately assess future consequences. At the same time, adolescents' minds and selves are highly malleable and capable of enormous change. Indeed, professional interventions with even seriously antisocial adolescents show that deviant behavior in youth can be abated, a phenomenon that is far less common among adults.

For these reasons, although *Amici* recognize that the Court has held that a sentence of life imprisonment without parole is within the judgment of the legislature to authorize or mandate for crimes committed by adults,[2] *Amici* submit that the same

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[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this Brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to fund or intended to fund the preparation or submission of this Brief. Counsel of record for all parties have consented to the filing of this Brief, and letters of consent have been filed with the Clerk.

[2] *Harmelin v. Michigan*, 501 U.S. 957 (1991).

sentence is categorically different for adolescents.[3] It is inherently cruel to lock up an adolescent and throw away the key, in disregard of the person's immaturity and the character-transforming changes that are virtually certain to occur in his or her near lifetime. *Amici* submit that the fundamental principles of justice and dignity embodied in the Eighth Amendment bar the State from condemning an adolescent to spend the rest of his or her life in prison with no possibility of parole.

Individual *Amici* are as follows:

- *J. Lawrence Aber* is Professor of Applied Psychology and Public Policy at the Steinhardt School of Culture, Education, and Human Development at New York University. He also is a Director of the Children's Institute at the University of Cape Town, South Africa. He is an internationally recognized expert in child development and social policy and testifies frequently before Congress, state legislatures, and other deliberative bodies. Professor Aber's research examines the influence of poverty and violence at the family and community levels on the social, behavioral, and cognitive development of children and youth. He also has designed and conducted evaluations of a variety of programs for children and youth, including violence prevention, literacy development, and antipoverty initiatives.
- *Marc S. Atkins* is Professor of Psychology in Psychiatry and Director of Psychology Training at the Institute for Juvenile Research at the University of Illinois at Chicago. Professor Atkins is a leading researcher on the development of

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[3] *See Roper v. Simmons*, 543 U.S. 551 (2005).

school-based mental health services in urban and high-poverty communities. He has published extensively on children's mental health. He is a consultant to the Chicago Public Schools and the Illinois Department of Mental Health.

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SUMMARY OF ARGUMENT

A sentence of life without parole usually reflects society's conclusion that an offender's culpability is so great, the benefit of deterrence so high, and the potential for change and rehabilitation so low that the person must be incapacitated for the rest of his or her days. The overwhelming body of scientific and academic study shows that these conclusions cannot be drawn with any degree of certainty for adolescents as a class, including adolescents who commit serious crimes. This body of work, which has only deepened since the Court relied upon it in *Roper v. Simmons*, demonstrates that the principal purposes of sentencing — punishing the culpable and deterring the rational — are not furthered by denying the possibility of parole to adolescents. Denying the possibility of parole also irrationally ignores the fact that adolescents as a class are substantially more likely than adults to change, transform, and rehabilitate during their remaining lifetimes — especially if they are subject to appropriate social interventions.

This Brief focuses on the state of the science regarding the neurological, physiological, psychological, and emotional development of adolescents. *First*, medical research and scientific studies continue to confirm post-*Roper* that human brain development occurs in distinct phases, with critical immaturities in judgment persisting throughout adolescence. In particular, the brain's frontal lobes are developing throughout the teen years, leading to fundamental differences between the decisionmaking ability of adolescents and adults. Adolescent brains also have a heightened sensitivity to immediate rewards, a deficit in sensitivity to long-

term risks, and immature psychosocial controls that make adolescents less able than adults to balance benefits and risks properly. These developmental and biological characteristics render adolescents categorically less culpable for the deficient decisions they make and diminish the deterrent effect of subjecting adolescents to the most severe adult punishments.

Second, adolescents are substantially more influenced than adults by peer pressure to engage in risky behaviors, as well as by environmental factors over which they have little control. Indeed, adolescents' underdeveloped psychosocial functions and reduced impulse control make them especially vulnerable to peer pressure and outside influences. This elevated susceptibility to negative pressures and influences renders adolescents less culpable for their decisions. It also is highly likely to change or be outgrown over time.

Third, adolescents are capable of enormous change. The Court recognized in *Roper* that the reckless and impetuous behavior of adolescents subsides with maturity, in part as a result of growth and development in the brain and in sense of self. Recent empirical studies have confirmed the effectiveness of rehabilitation for adolescents, including for adolescents who commit serious crimes. Specifically, studies show that adolescents' recidivism rate decreases when rehabilitative programs are provided, a finding that is less frequent with adults. In short, the same immaturity and brain plasticity that render youth more vulnerable to outside influences also make them highly receptive to rehabilitation.

Fourth, to the extent society depends on the protections of the legal process to identify and account for adolescent deficiencies and capabilities on a case-by-case basis, research shows that adolescents are far less capable than adults of participating effectively in legal proceedings, including by relating to and communicating with authority figures such as the police, judges, and even their own counsel. One cannot assume that the system will fairly and accurately identify only those thirteen- to seventeen-year-olds who are most deserving of the most severe punishments. Independent judgment regarding the constitutional acceptability of the punishment is required.

In sum, the purposes of a sentence of life without the possibility of parole are not served by imposing that sentence on adolescents. Consequently, a sentence of life without the possibility of parole cannot be said to be proportionate or fair in this context. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

ARGUMENT

I. SCIENTIFIC AND ACADEMIC RESEARCH CONTINUES TO CONFIRM POST-*ROPER* THAT ADOLESCENTS ARE CATEGORICALLY LESS MATURE AND MORE PRONE TO ENGAGE IN RISKY BEHAVIORS THAN ADULTS.

In *Roper* the Court relied upon scientific and academic studies in determining that certain punishments appropriate for adults do not necessarily fit adolescents. *Roper* prohibited the death penalty for all juveniles based in part on studies demonstrating that youths exhibit pronounced differences from adults — including a

lack of maturity, an underdeveloped sense of responsibility, heightened vulnerability to negative influences, still-developing character, and transitory personality traits. As a result of each of these factors, the Court concluded that adolescents' decisionmaking processes are inherently less reliable than those of adults and do not necessarily reflect the decisionmaking processes that the same individuals will exhibit upon maturity.[4] Consequently, although responsible for their actions, adolescents are generally less culpable than fully-mature adults, and "cannot with reliability be classified among the worst offenders" deserving of the most severe punishments.[5] Research since *Roper* only reinforces those conclusions.

A. Adolescents Engage in Risky Behavior.

Society has long understood that adolescents in their formative years lack the experience, perspective, and judgment expected of adults.[6] Indeed, adolescents' elevated appetite for risky behaviors has been widely observed.[7] Statistics support that observation and show that adolescents are far more likely than adults to engage in antisocial behavior of all types, including fighting, joining gangs, driving recklessly or drunk, using illegal drugs, and having unprotected sex.[8] These behaviors

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[4] *Roper*, 543 U.S. at 569-70 (2005).

[5] *Id.* at 569.

[6] *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988).

[7] *See, e.g.*, Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 78 (2008).

[8] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Lawrence B. Finer & Stanley K. Henshaw, *Disparities in*

are particularly acute for adolescents subject to conditions that routinely place them in risky situations and deprive them of positive role models, such as extreme poverty, poor schools, and violent communities.[9] Psychologists and social scientists have documented and examined these factors in numerous empirical studies.[10]

B. Adolescents Take More Risks in Part Due to Differences in Neurological Development.

In recent years, science has identified a biological basis for these common-sense and empirical observations of adolescent decisionmaking and behavior. Research is making it increasingly clear that adolescence is a time of great structural change in the composition and workings of the brain. These studies — including studies relied upon in *Roper* and

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Rates of Unintended Pregnancy in the United States, 1994 and 2001, 38 PERSP. ON SEXUAL REPROD. HEALTH 90 (2006); Eve K. Moscicki, *Epidemiology of Completed and Attempted Suicide: Toward a Framework for Prevention*, 1 CLINICAL NEUROSCI. RES. 310 (2001); Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 CRIME & JUST. 359 (2003); NATIONAL RESEARCH COUNCIL, INSTITUTE OF MED. & TRANSPORTATION RESEARCH BD., PREVENTING TEEN MOTOR CRASHES: CONTRIBUTIONS FROM BEHAVIORAL AND SOCIAL SCIENCE, WORKSHOP REPORT (2007), *available at* http://www.nap.edu/catalog/11814.html.

[9] Michelle Fine & Jessica Ruglis, *Circuits and Consequences of Dispossession: The Racialized Realignment of the Public Sphere for U.S. Youth*, 17 TRANSFORMING ANTHROPOLOGY 20, 30 (2009).

[10] *See, e.g.*, Robert W. Blum et al., *The Effects of Race/Ethnicity, Income, and Family Structure on Adolescent Risk Behaviors*, 90 AM. J. PUB. HEALTH 1879 (2000); Robert J. Sampson & John H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 CHILD DEV. 525 (1994); Patrick H. Tolan et al., *The Developmental Ecology of Urban Males Youth Violence*, 39 DEVELOPMENTAL PSYCHOL. 274 (2003).

studies completed since — provide one explanation for the differences in adolescent behavior that psychologists and social scientists have long documented through empirical work.

This explanation is based on the trajectory of brain development. During the early teen years, the brain undergoes at least five principal growth processes. The *first* is "arborization," a process by which connections between brain cells branch and increase in number as the brain grows more gray matter.[11] *Second*, from the early teens through early adulthood, the brain undergoes "neural pruning," a process by which the brain fine-tunes connections between neurons. Connections that are used most often — which can vary based on an individual's experience and environment — grow stronger, while those that are unused disappear.[12] As unnecessary connections are eliminated, the brain becomes more efficient in carrying information.[13]

The *third* process is myelination, whereby nerve pathways are insulated to increase the speed at

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[11] *See* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 82 (2004).

[12] Linda P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVIEWS, 417, 439 (2000).

[13] Sarah-Jayne Blakemore & Suparna Choudhury, *Development of The Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296, 297 (2006); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 66-67 (2008); Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 PERSP. PSYCHOL. SCI. 59, 59, 65 (2006).

which signals are conducted through them.[14] *Fourth*, a rapid increase followed by a gradual decrease of dopamine receptors occurs in the prefrontal cortex.[15] Dopamine plays a critical role in heightening the brain's sensitivity to rewards, and dopaminergic activity is at its peak during the ages of twelve through eighteen. *Finally*, neural connections between the cortical and subcortical regions increase during later adolescence, which allows the area of the brain providing psychosocial control to begin to govern the area that generates emotional responses.[16]

Research shows that the primitive areas of the brain that produce emotions are the first to mature, while areas of the brain involved in higher-level control functions develop later.[17] Post-mortem histological studies have long suggested that the frontal lobes continue to develop through pruning and myelination from early adolescence through a person's early twenties.[18] More recently, tests using magnetic resonance imaging ("MRI") technology have confirmed that the frontal lobes — in particular, the prefrontal cortex, or the anterior part of the frontal lobes, which are responsible for "executive functions" such as self-control, judgment, emotional regulation,

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[14] Heather M. Conklin et al., *Working Memory Performance in Typically Developing Children and Adolescents: Behavioral Evidence of Protracted Frontal Lobe Development*, 31 DEVELOPMENTAL NEUROPSYCHOL. 103, 104 (2007).

[15] Spear, *supra* note 12, at 440, 443.

[16] Casey et al., *supra* note 13, at 67; Thomas J. Eluvathingal, *Quantitative Diffusion Tensor Tractography of Association and Projection Fibers in Normally Developing Children and Adolescents*, 17 CEREBRAL CORTEX 2760 (2007).

[17] Casey et al., *supra* note 13, at 66.

[18] Conklin et al., *supra* note 14, at 104.

organization, and planning — are among the last regions of the brain to mature.[19] Neurological research conducted through recent advances in MRI testing suggests that even as adolescents' brains mature in other areas, adolescents still do not reason in the same manner as adults because they lack fully formed frontal lobes.[20]

Studies also suggest that the immature controls associated with underdeveloped frontal lobes are at least partly responsible for higher rates of risk-taking among adolescents. Indeed, studies confirm that adolescents use different areas of the brain to complete tasks that, in adults, would normally be completed by the frontal lobes.[21] For example, the better-developed limbic system, which is the emotional center of the brain, has been observed to "stand in" for adolescents' immature control functions, meaning that the adolescent may process emotionally what the adult processes through logic and reason.[22]

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[19] Casey et al., *supra* note 13, at 66; Conklin et al., *supra* note 14, at 104-105.

[20] *See* Casey et al., *supra* note 13, at 66; Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 340 (2008); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (May 25, 2004), *available at* www.pnas.org_cgi_doi_10.1073_pnas.0402680101.

[21] *See* Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596, 599 (2004).

[22] Coalition for Juvenile Justice, *Applying Research to Practice: What Are the Implications of Adolescent Brain Development for Juvenile Justice* 6-7 (May 5, 2006), *available at* http://www.juvjustice.org/media/resources/resource_138.pdf; *see also* Casey et al., *supra* note 13, at 63-64.

One MRI study published in June 2006 demonstrates how emotional centers of the brain can overbalance the caution and forethought exerted by the frontal areas in adolescents. Subjects were asked to respond quickly to cues in a video game in order to earn rewards of various amounts. Scientists captured MRI images showing which areas of the brain were most active during the task. The study found that adolescents showed child-like levels of activity in the areas of the brain that control decisionmaking (the orbital frontal cortex), but more adult-like levels of activity in the better-developed accumbens, an impulse-producing region of the brain. As the rewards in the game grew, the activity levels in the accumbens of adolescents' brains also increased dramatically. This study demonstrates the biological nature of adolescents' exaggerated preferences for rewards.[23] Other studies have shown similar results.[24]

Adolescents' impulsiveness also results from an innate under-appreciation of cost and overvaluation of short-term rewards, which together

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[23] Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 J. NEUROSCI. 6885 (2006).

[24] *See, e.g.*, James M. Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. NEUROSCI. 4839 (2007); Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270 (2007); Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who Is at Risk?*, 10 DEVELOPMENTAL SCI. F-8 (2007); Scott C. Matthews et al., *Selective Activation of the Nucleus Accumbens During Risk-Taking Decision Making*, 15 NEUROREPORT 2123 (2004).

create a heightened preference for risk.[25] Research conducted under controlled conditions has attempted to parse the bases for this decisionmaking, and shows that adolescents systematically overvalue immediate rewards while undervaluing both future rewards and future costs. In a series of studies published in 2004 and 2005, subjects were asked to choose playing cards from "bad" decks, which include the potential for very large one-time rewards but generally lead to net losses over time, or "good" decks, which offer smaller one-time rewards but lead to net gains over time (known as the "Iowa Gambling Task"). Adults learned to choose the good decks and avoid the bad decks more quickly than their thirteen- through fifteen-year-old counterparts, demonstrating a superior ability to learn from experience, reduced preference for immediate reward, and higher aversion to punishment.[26] Another gambling task study, currently in press, shows that the period between ages fifteen and seventeen is exceedingly important for the development of decisionmaking abilities. The study shows that immediate "reward sensitivity," or preference for the good decks, peaks

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[25] Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51, 54 (2004); *see also* Stephanie M. Holm et al., *Reward-Related Brain Function and Sleep in Pre/Early Pubertal and Mid/Late Pubertal Adolescents*, J. ADOLESCENT HEALTH (forthcoming 2009).

[26] Eveline A. Crone & Maurits W. van der Molen, *Developmental Changes in Real Life Decision Making: Performance on a Gambling Task Previously Shown to Depend on the Ventromedial Prefrontal Cortex*, 25 DEVELOPMENTAL NEUROPSYCHOL. 251 (2004).

during adolescence, while avoidance of the bad decks develops more slowly — linearly with age.[27]

A study published in 2009 provides further confirmation of adolescents' elevated perception of the benefits of future rewards.[28] The study found the starkest differences in ability between adolescents and young adults, including with respect to self-reported likelihood of planning ahead and consideration of the future, self-reported inclination to anticipate the future consequences of today's actions, and demonstrable preferences for immediate rewards. For example, compared to young adults, adolescents tended to choose smaller immediate rewards (*e.g.*, $600 tomorrow) even when offered much larger delayed rewards (*e.g.*, $1000 one year later).[29] These results confirm that the adolescents' consideration of the future import of their actions differs from that of adults, and is likely to change over time.

Another factor leading to impulsiveness and poor decisionmaking in adolescents is the elevated

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[27] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, DEVELOPMENTAL PSYCHOL. (forthcoming 2009); *see also* Catalina J Hooper et al., *Adolescents' Performance on the Iowa Gambling Task: Implications for the Development of Decision Making and Ventromedial Prefontal Cortex*, 40 DEVELOPMENTAL PSYCHOL. 1148 (2004); Katya Rubia et al., *Progressive Increase of Frontostriatal Brain Activation from Childhood to Adulthood During Event-Related Tasks of Cognitive Control*, 27 HUM. BRAIN MAPPING 973 (2006).

[28] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 470 (2009) (citing Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009)).

[29] *Id.*

impact of stress. Stress causes the release of high levels of dopamine in adolescent brains, which further impairs the already-underdeveloped prefrontal cortical regulation of behavior and thought.[30] High levels of dopamine combined with immature prefrontal activity may lead to insufficient control over the reward-processing regions of the brain. Accordingly, compared to adults, adolescents experience dramatic loss of judgment during emotional or stressful situations.[31]

The cumulative result of these normal developments in adolescents is a period of vulnerability during the ages of twelve to eighteen, when adolescents have an enhanced biological propensity to value immediate sensory rewards at the cost of long-term consequences, but have not developed the brain connections to regulate impulses and make more well-reasoned decisions. Adolescent brains differ from adult brains in this fundamental respect, particularly with respect to the areas governing judgment and decisionmaking.

It has been said that the very part of the brain that is judged by the legal process — the frontal lobes — develops last, and may not be fully mature until long after the offense has been committed, reducing culpability.[32] Moreover, as a result of their

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[30] Amy F. T. Arnsten & Rebecca M. Shansky, *Adolescence: Vulnerable Period for Stress-Induced Prefrontal Cortical Functioning?*, 1021 ANNALS N.Y. ACAD. SCI. 143, 144 (2004); Coalition for Juvenile Justice, *Applying Research to Practice: What Are the Implications of Adolescent Brain Development for Juvenile Justice* 5-6 (May 5, 2006), http://www.juvjustice.org/media/resources/resource_138.pdf.

[31] Casey et al., *supra* note 13, at 64.

[32] *See* Mary Beckman, *supra* note 21, at 596.

impulsiveness and lack of cognitive function, adolescents are comparatively immune to the deterrent effects of severe sentences.[33] As the adolescent matures, however, his or her decisionmaking ability likely will improve, such that the same individual will make different and better decisions as an adult.

II. THE ADOLESCENT BRAIN IS PLASTIC, RENDERING ADOLESCENTS HIGHLY SUSCEPTIBLE TO OUTSIDE INFLUENCES (INCLUDING PEER PRESSURE AND ENVIRONMENTAL STRESSES) YET CAPABLE OF ENORMOUS CHANGE THROUGH REHABILITATION.

A. Adolescents Are Unusually Susceptible to Peer Influence.

No one reasonably disputes that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," than adults.[34] Anyone familiar with young people knows that susceptibility to peer pressure is particularly high in late childhood and early adolescence. In confirmation of this point, laboratory experiments show that the presence of peers doubles the risky behavioral decisions of middle adolescents but has no effect on adults.[35]

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[33] Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 186-87 (1994-95) (citing Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQUENCY 96, 100-102 (1994)).

[34] *Roper*, 543 U.S. at 569.

[35] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking*, 41 DEVELOPMENTAL PSYCHOL. 625 (2005).

Ironically, heightened sensitivity to the influence of peers also is a necessary part of adolescents' normal development into functional adults.[36] Identity formation involves a series of trials and errors in which adolescents gauge reactions from others to select and integrate elements of their personality into a realized self.[37] Formation of the adult brain requires this experimentation and risk-taking,[38] and adolescents' desire for peer approval (or fear of rejection) can affect their decisions even without direct coercion by peers.[39] The ability to resist peer influence develops over time, particularly during the ages of fourteen through eighteen.[40]

Susceptibility to peer pressure may in the wrong circumstances translate into susceptibility to committing crimes. It is well-established that adolescents tend to commit crimes in group settings, because group settings provide strong incentives for conformity and compliance.

The nature and extent of peer influence on adolescent criminal b[illegible]avior has been documented through rigorous science, including laboratory experiments, field observations, clinical

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[36] Ann E. Kelley et al., *Risk Taking and Novelty Seeking in Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 27, 28 (2004).

[37] ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 51 (2008).

[38] Kelley et al., *supra* note 36, at 28.

[39] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

[40] Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538-39 (2007).

interventions, and brain-imaging studies.[41] In one experiment, deviant adolescents were randomly placed into a group setting with either all deviant peers or mixed deviant and non-deviant peers. The adolescents placed with all deviant peers displayed more deviant behaviors, demonstrating peer influence.[42] In a field study, exposure to delinquent peers was found to result in increased criminal behavior by adolescents over time, independent of any self-selection into deviant peer groups, further demonstrating the influence of peers.[43] Indeed, numerous studies have shown that adolescent criminal behavior increases after entry into peer gangs and declines after exit from these gangs.[44] Two recent comprehensive reviews of the literature concluded that peer influence effects on serious antisocial behavior are robust and strongest among young adolescents who are in the presence of slightly older, slightly more deviant peers.[45] In short,

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[41] *See generally* DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH (Kenneth A. Dodge, Thomas J. Dishion & Jennifer E. Lansford eds., 2006); Philip Cook et al., *The Negative Impact of Starting Middle School in Sixth Grade*, 27 J. POL'Y ANALYSIS & MGMT. 104 (2008); Marie-Helene Grosbras et al., *Neural Mechanisms of Resistance to Peer Influence in Early Adolescence*, 27 J. NEUROSCI. 8040, 8040 (2007).

[42] RONALD A. FELDMAN ET AL., THE ST. LOUIS CONUNDRUM: THE EFFECTIVE TREATMENT OF ANTISOCIAL YOUTHS (1983).

[43] Kristan Glasgow Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 JOURNAL OF YOUTH AND ADOLESCENCE 395, 420-21 (2000).

[44] Terence P. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 J. RES. CRIME & DELINQUENCY 55, 80 (1993).

[45] DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH, *supra* n. 41, at 367; UNDERSTANDING PEER INFLUENCE IN CHILDREN AND

adolescents exhibit a predisposition to follow peer influence that is profound, that is reversible, and that adults simply do not share.

B. Adolescents Are Highly Influenced by -- and Live at the Mercy of — Psychosocial Conditions, Socioeconomic Variables, and Other Environmental Factors.

Children's brains adapt to children's environments. Beginning when a child is still in the womb, the brain organizes itself so that neurons and neural systems change in a "use-dependent" way.[46] Brain cells connect to each other via synapses, and synapses grow and become stronger when they are used. If an environment or set of experiences is frequent, the same synapses repeatedly are used and strengthened. This strengthening process is crucial for building memory and skill.

The moldability of brain connections through external experience is termed "plasticity." As a result of plasticity, the more often an individual is exposed to threatening environments — including difficult home and neighborhood environments — the more quickly the brain learns to respond to those threats.[47] Frequent exposure to threatening or

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ADOLESCENTS 9 (Mitchell J. Prinstein & Kenneth A. Dodge eds., 2008).

[46] Bruce D. Perry, Inaugural Lecture at the Margaret McCain Lecture Series: Maltreatment and the Developing Child: How Early Childhood Experience Shapes Child and Culture, (Sept. 23, 2005), *available at* http://www.lfcc.on.ca/mccain/perry.pdf.

[47] *See* R.M. Post, *Transduction of Psychosocial Stress into the Neurobiology of Recurrent Affective Disorder*, 149 AM. J. PSYCHIATRY 999, 1004-05 (1992); *see also* DEBRA NIEHOFF, THE BIOLOGY OF VIOLENCE: HOW UNDERSTANDING THE BRAIN,

violent environments strains the adolescent's immature prefrontal lobe, and this strain further impairs an adolescent's ability to control his or her own impulses.[48]

More than 100 studies have demonstrated that early exposure to threatening or traumatic environments leads a young person to develop hypervigilance in responding to certain threat cues.[49] This type of upbringing also instills a biased readiness to attribute hostile intent to other persons. A child whose brain has adapted to an environment of chaos will continue in a physiological state of alarm even when the environment has stabilized and the threat is not immediately present.[50] Although these adaptive responses are designed to help the child cope in a threatening environment, they also lead to growth in violent behavior.[51] Traumatized children may simply have less capacity to respond appropriately to the everyday demands and stresses of life.[52] Indeed, childhood abuse or neglect has been shown to increase the likelihood of arrest as a

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BEHAVIOR, AND ENVIRONMENT CAN BREAK THE VICIOUS CIRCLE OF AGGRESSION 182-87 (1999).

[48] Jane Rutherford, *Community Accountability for the Effect of Child Abuse on Juvenile Delinquency in the Brave New World of Behavioral Genetics*, 56 DEPAUL L. REV. 949, 953 (2007).

[49] *See* Kenneth A. Dodge, *Translational Science in Action: Hostile Attributional Style and the Development of Aggressive Behavior Problems*, 18 DEV. & PSYCHOPATHOLOGY 791, 792, 807 (2006).

[50] *See* Perry, *supra* note 46.

[51] *See* Kenneth A. Dodge, *supra* note 49.

[52] *See* Kenneth A. Dodge et al., *Aggression and Antisocial Behavior in Youth*, *in* 3 HANDBOOK OF CHILD PSYCHOLOGY: SOCIAL, EMOTIONAL, AND PERSONALITY DEVELOPMENT 719, 757 (6th ed., 2006) [hereinafter Dodge et al., HANDBOOK].

juvenile by 59%. Abuse also correlates with a younger age of first arrest.[53]

Studies also indicate that criminal behavior in adolescents correlates with socioeconomic conditions, which are outside the control of the adolescent and subject to change. Research consistently shows that neighborhoods with high rates of juvenile offenders tend to be characterized by poverty, population heterogeneity, and family disruption.[54] One 2005 study indicated that: (1) family poverty, measured by welfare receipt, is positively related to juvenile's involvement in robbery, burglary and theft; (2) county poverty, measured by per capita welfare spending, is positively related to the likelihood of selling drugs, assault, and robbery; and (3) lack of employment opportunities, as measured by the county employment rate, is correlated with the selling of drugs and robbery.[55]

Poverty also exacerbates adolescents' susceptibility to peer influence. Adolescents who live in high-crime neighborhoods may find that the pressures to join in criminal activity are overwhelming, and a young person may feel that participation in criminal activity is necessary to avoid

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[53] Cathy S. Widom & Michael G. Maxfield, *An Update on the "Cycle of Violence"*, NAT'L INST. JUST. RES. BRIEF, Feb. 2001. Conversely, greater attachment to family and school reduces the prevalence, intensity, and frequency of deviant behavior. Sanford M. Dornbusch et al., *The Relation of Family and School Attachment to Adolescent Deviance in Diverse Groups and Communities*, 16 J. ADOLESCENT RES. 396, 416 (2001).

[54] *See, e.g.*, ROBERT JOSEPH BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME 25-26, 50, 82 (1993).

[55] H. Naci Mocan & Daniel I. Rees, *Economic Conditions, Deterrence and Juvenile Crime: Evidence from Micro Data*, 7 AM. L. ECON. REV. 319, 341 (2005).

threats to his or her own safety.[56] Indeed, studies demonstrate that adolescents with less education or from socioeconomically disadvantaged backgrounds score lower in tests of future orientation than juveniles from more privileged backgrounds.[57]

Aggressive survival responses, antisocial conditions, and deprived backgrounds may or may not manifest as criminal behavior, and it is important to note that juveniles' responses to these stresses develop throughout adolescence. Indeed, adolescents are capable of reversing or outgrowing these effects if discipline and socialization are introduced.[58] The same brain plasticity that renders an adolescent susceptible to these stressors makes them capable of rehabilitation and reform.

C. Rehabilitation in Adolescents Is Highly Effective.

The Court recognized in *Roper* the simple truth that the "signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[59] Research confirms that risky or

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[56] Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 241 (2003).

[57] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 29 (2009) (citing Jari-Erik Nurmi, *Age, Sex, Social Class, and Quality of Family Interaction as Determinants of Adolescents' Future Orientation: A Developmental Task Interpretation*, 22 ADOLESCENCE 977 (1987)).

[58] *See* Cathy Spatz Widom, *The Cycle of Violence*, 244 SCIENCE 4901 (1989); *see also* John Paul Wright & Francis T. Cullen, *Parental Efficacy and Delinquent Behavior: Do Control and Support Matter?*, 39 CRIMINOLOGY 677 (2001).

[59] *Roper*, 543 U.S. at 570.

antisocial behavior in adolescence is fleeting. Only a small proportion of adolescents who engage in illegal activities continues to commit offenses as adults.[60] As noted above, neurological studies show that adolescent brains are still learning, developing, and creating new connections, which in turn suggests that juveniles are likely to be more responsive than adults to rehabilitation. In short, "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[61]

The potential for rehabilitation exists even for the most difficult adolescents. For example, despite the detrimental effects of early childhood neglect or trauma, evidence indicates that a child's brain can be repaired by repetitive exposure to developmentally-appropriate experiences. Studies have shown that repeated exposure to positive developmental experiences will influence precisely those parts of the brain that were altered by the neglect or other trauma the child faced.[62] Adolescents change rapidly — in response to both trauma and rehabilitation. Longitudinal empirical studies confirm that a sizable percentage of antisocial early adolescents stop their antisocial behavior by adulthood, as a result of structured intervention or

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[60] *See* Steinberg & Scott, *supra* note 39, at 1014; *see also* Scott & Steinberg, *supra* note 37, at 52-53 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 1995 (1997)).

[61] *Roper*, 543 U.S. at 570.

[62] *See* Perry, *supra* note 46.

natural life events such as starting a family or joining the workforce.[63]

Treatment of Conduct Disorder serves as an example. Conduct Disorder, a high-risk psychiatric condition in which a child repeatedly violates basic social rules and which was once believed to be impervious to treatment, has been proven treatable through intervention programs.[64] Numerous intervention studies show that even the highest-risk youths can be treated effectively, resulting in a reduced likelihood that they will engage in violence in the future.[65] A panel of eminent scientists and practitioners assembled in 2003 by the National Institute of Health to review the state of the science concluded that intervention programs are effective in preventing serious violence, even in highest-risk youths.[66] The President's New Freedom Commission on Mental Health came to a similar conclusion in 2003.[67] The United States Surgeon General has

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[63] Robert J. Sampson & John H. Laub, *A Life-Course View of the Development of Crime*, 602 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 17-18 (2005).

[64] Paul J. Frick, *Effective Interventions for Children and Adolescents With Conduct Disorder*, 46 CANADIAN J. PSYCHIATRY 597, 605 (2001).

[65] *See* Dodge et al., HANDBOOK, *supra* note 52, 765-69; CONDUCT PROBLEMS PREVENTION RESEARCH GROUP, *Fast Track Randomized Controlled Trial to Prevent Externalizing Psychiatric Disorders: Findings From Grades 3 to 9*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1250-1262 (2007).

[66] Linda S. Chan et al., Evidence Report/Technology Assessment No. 107, *Preventing Violence and Related Health-Risking Social Behaviors in Adolescents* (Oct. 2004).

[67] *See* PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA (2003).

reached the same conclusion.[68] Because even the most difficult conditions may be treatable in adolescents, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[69]

III. ADOLESCENTS ARE FAR LESS CAPABLE THAN ADULTS TO AID IN THEIR DEFENSE BEFORE AND DURING TRIAL.

The Court may reasonably inquire whether the legal system can account for the unique characteristics of adolescents during trial and sentencing. It cannot. For the reasons stated above, no one — not professional psychiatrists, and certainly not the judicial system — can reliably identify those few (if any) adolescents for whom hope can or should be abandoned at an early age.

Adolescents are at a particular disadvantage in a legal process designed for adults. To be sure, many of these cases involve adolescents who are "competent" within the legal understanding of the term. Nonetheless, fairness requires that defendants be able to participate effectively in the proceedings against them, which requires an understanding of the nature of the proceedings, an ability to consult with counsel, and the ability to assist in preparing their defense.[70]

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[68] U.S. PUB. HEALTH SERV., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001).

[69] *Roper*, 543 U.S. at 573.

[70] *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Dusky v. United States*, 362 U.S. 402 (1960).

Even competent adolescents lag behind adults in each of these areas of legal and functional capability. Accordingly, *Amici* respectfully submit that the Court should take great pause before assuming that the legal system — which depends greatly upon the participation of the accused — will fairly and accurately identify only those thirteen- to seventeen-year-olds who are most deserving of the most severe punishment.

First, adolescents are far less able than adults to understand the nature of the legal proceedings against them — including the charges pending, the costs and benefits of available pleas, the roles of key courtroom figures, the import of potential penalties, and the rights that are constitutionally guaranteed to them.[71] Even "[t]he most informal and well-intentioned of judicial proceedings" — which criminal prosecutions are not — "are technical; few adults without legal training can influence or even understand them; certainly children cannot."[72]

Studies show that adolescents are at great risk of failing to comprehend fundamental aspects of the justice system, and adolescents from disadvantaged backgrounds are at particular risk. For example, one study found that only 28% of sixteen- to eighteen-year-old students living in areas with low rates of income and education understood that the right to remain silent protects them from being ordered to

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[71] *See* THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 163, 147, 158 (2000).

[72] *In re Gault*, 387 U.S. 1, 38 n.65 (1967) (quoting REPORT OF THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)).

speak in a courtroom. By comparison, 52% of students from middle-income backgrounds understood this fact. The low-income students also were comparatively less likely to understand the significance of a confession or the right to be represented by counsel.[73]

Second, adolescents are far less able than adults to assist their own counsel. The Court has long recognized that an adolescent has special needs in the legal process and requires the "guiding hand of counsel at every step of the proceedings against him."[74] However, adolescents' immaturities affect their ability to communicate meaningfully with their counsel, to provide counsel with information relevant to a defense, and to preserve the attorney-client relationship.[75] Adolescents lack adult levels of concentration, which impedes their ability to provide information regarding events relevant to the crime.[76] Adolescents' lack of life experience can prevent them from recognizing exculpatory facts. Adolescent offenders also suffer from psychological disorders at alarming rates, which generally go without treatment.[77] These deficiencies are only exacerbated

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[73] Shavaun M. Wall & Mary Furlong, *Comprehension of Miranda Rights by Urban Adolescents with Law-Related Education*, 56 PSYCHOL. REP. 359, 366-68 (1985).

[74] *In re Gault*, 387 U.S. at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

[75] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 475 (2009).

[76] Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 819 (2005).

[77] *See* Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUVENILE JUST. 21, 30 (2004).

in situations of deep deprivation or poverty. Indeed, one 2007 study showed that living in a deeply impoverished neighborhood reduces the verbal ability of children by a magnitude equivalent to one missed year of school.[78]

Due to age and inexperience, adolescents may fundamentally misapprehend their attorney's role. Effective trial participation requires "a personally relevant understanding of the lawyer's advocacy role and the confidential nature of the attorney-client relationship, as well as comprehension of one's own directive role in the process."[79] Adolescent defendants often lack this understanding — for example, they may be prone to question an attorney's allegiance and withhold relevant information out of fear that such information will be used against them.[80] One study showed that while 96% of juveniles reported that they believed attorney-client confidentiality prevented their attorney from disclosing their conversations, 26% of those participants also believed that a lawyer could disclose any information to the judge and 30% believed that the lawyer could tell their parents what they had said.[81] Another study found that one-in-three to one-

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[78] Robert J. Sampson et al., *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PROC. NAT'L ACAD. SCI. 845 (2008).

[79] Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 177 (2003) (citing EMILY BUSS, THE ROLE OF LAWYERS IN PROMOTING JUVENILES' COMPETENCE AS DEFENDANTS (R.G. Schwartz ed., 2000)).

[80] *Id.*

[81] Michele Peterson-Badali et al., *Young People's Experience of the Canadian Youth Justice Systems: Interacting with Police and Legal Counsel*, 17 BEHAV. SCI. & L. 455, 461 (1999)

in-four juvenile offenders, as compared to one-in-ten adult offenders, believed that if they told their attorney that they had committed the act in question, then their attorney would not be able to defend them at all.[82]

Third, adolescents are far less capable of making important legal decisions and assisting in their own defense. The four basic dimensions of psychosocial maturity most relevant to decisionmaking are susceptibility to peer pressure, risk perception, future orientation, and impulsivity.[83] As stated, adolescents differ substantially from adults in all four areas. Compared to adults, adolescents attach more value to short-term results than to long-term consequences — positive or negative — when making decisions.[84] Likewise, adolescents are more likely to seek immediate gains, such as curtailing of difficult questioning by over- or under-emphasizing their role in a crime. They are less likely to focus on long-term benefits, such as the advantages that come with plea agreements. Adolescents are even more likely to avoid admitting or communicating difficult facts to their attorneys.[85] These fundamental judgmental deficiencies put adolescents at a severe disadvantage in the formal legal process, significantly undermining the

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(discussing Canadian youth's understanding of legal concepts similar to those found in U.S. law).

[82] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1158 (1980).

[83] Steinberg & Scott, *supra* note 39, at 1012.

[84] Schmidt et al., *supra* note 79, at 176, 191; Steinberg & Scott, *supra* note 39, at 1012, 1019.

[85] Schmidt et al., *supra* note 79, at 176, 191.

possibility that individual capabilities or deficiencies will be caught in the ordinary workings of our system.

CONCLUSION

Well-established, growing, and uniform scientific and academic study shows that the purposes of a sentence of life without parole — punishing the culpable, deterring the sensible, and incapacitating the incorrigible — are not reliably or rationally served by the imposition of that sentence upon adolescents. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

Respectfully Submitted,

July 23, 2009

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS, AMERICAN CATHOLIC CORRECTIONAL CHAPLAINS ASSOCIATION, AMERICAN CORRECTIONAL CHAPLAINS

(Continued on inside cover)

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IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Perspectives of Religious Organizations Are Important to This Court's Interpretation of the Eighth Amendment 3

II. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole for Non-Homicide Crimes Disregards the Special Status That Juveniles Are Accorded Due to Their Diminished Capacity 5

A. Christianity, Judaism, Islam, and Buddhism Accord Juveniles Special Treatment on Account of Their Lesser Mental Sophistication, Both Generally and with Respect to Criminal Matters in Particular 6

B. The Distinctions Drawn by Christianity, Judaism, Islam, and Buddhism with Respect to Juveniles Are Supported by Science and

Contents

Page

Mirrored in State and Federal Law, As Well As the Laws of Other Nations 8

C. Sentencing Juveniles to Life Imprisonment Without the Possibility of Parole for Non-Homicide Offenses Constitutes Cruel and Unusual Punishment Because It Disregards the Longstanding Societal Consensus That Juveniles Merit Special Treatment 13

III. Imposing Life Imprisonment Without the Possibility of Parole on Juvenile Offenders Contravenes Fundamental Religious Values 14

A. Imposing Such a Punitive Sentence on Juvenile Offenders Contravenes Religious Teachings That Tell Us That All Individuals, and Particularly Juveniles, Are Deserving of Mercy, Forgiveness, and Compassion 15

B. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole Denies Them Their Potential for Rehabilitation and Development 20

Contents

Page

C. The Fundamental Values Espoused by Christianity, Judaism, Islam, and Buddhism Demand That Juvenile Offenders Like Mr. Sullivan and Mr. Graham Be Given the Possibility of Parole 24

CONCLUSION 28

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

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Page

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Page

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Bible ..... *passim*

Ethics of the Fathers 17

Letter 133 from Saint Augustine to Marcellinus (A.D. 412), in 1 Nicene and Post-Nicene Fathers, First Series, Vol. 1 (J.G. Cunningham trans., Philip Schaff ed., 1887), *available at* http://www.newadvent.org/fathers/1102133.htm (revised & edited for New Advent by Kevin Knight) 20

Cited Authorities

	Page
Maimonides, *Yad Hachazakah*	17
Majhima Nikaya	23
Qur'an	*passim*
Theragatha	23

INTEREST OF AMICI CURIAE

A coalition of Christian, Jewish, Muslim, and Buddhist religious organizations and individuals join here as amici curiae on behalf of Petitioners Joe Harris Sullivan and Terrance Jamar Graham.[1] Amici's faith traditions, while varied and diverse, all agree that it is morally unjustifiable to sentence juveniles convicted of non-homicide offenses to life imprisonment without the possibility of parole. The imposition of such a harsh punishment on youth contravenes contemporary standards of decency and, as such, violates the Eighth Amendment's guarantee against cruel and unusual punishment.

Individual statements of interest are provided in the Appendix to the Brief.

SUMMARY OF ARGUMENT

Amici, despite the highly nuanced and well-publicized differences in theology and moral outlook within and among Christianity, Judaism, Islam, and Buddhism, unite to object to the imposition of life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses. First, amici's faith traditions, secular law generally, and contemporary American society all accord juveniles

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[1] Counsel of record for all parties received notice of amici curiae's intention to file this brief. Letters of consent by the parties to the filing of this briefing have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

special treatment because of their unique status. Juveniles are still developing and maturing; they do not grasp the full consequences of their actions, and therefore are less morally culpable for their conduct and less susceptible to deterrents. Sentencing a juvenile to die in prison callously disregards this special status and diminished capacity. Second, amici's fundamental religious texts teach that all individuals are deserving of mercy, forgiveness, and compassion. This is particularly true of members of vulnerable populations, such as children. Imposing such a punitive sentence on youth—especially those who, like Mr. Sullivan, committed non-homicide offenses when they were only thirteen years old—is to act without regard to any such considerations. Finally, life imprisonment without the possibility of parole is a sentence that conflicts with the concept of restorative justice, which is embraced by all of amici's faith traditions, because it denies juvenile offenders the possibility of meaningfully rehabilitating and redemption.

Juvenile offenders should not be rendered immune from punishment. However, amici cannot endorse subjecting youth who commit non-homicide offenses to the permanent condemnation of a sentence of life imprisonment without the possibility of parole. Such an overly harsh punishment cannot be reconciled with the fundamental values espoused by amici's religious traditions and is contrary to contemporary standards of decency. Accordingly, it violates the Eighth Amendment's prohibition against cruel and unusual punishment.

ARGUMENT

I. The Perspectives of Religious Organizations Are Important to This Court's Interpretation of the Eighth Amendment

The Eighth Amendment's prohibition against cruel and unusual punishment is not a static doctrine "fastened to the obsolete," *Thompson v. Oklahoma*, 487 U.S. 815, 821 (U.S. 1988) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)), but should be interpreted according to "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (U.S. 2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality)).

The importance of a society's religious organizations' views on issues of morality, crime, and punishment to that society's standards of decency is well recognized. Indeed, "[f]or the vast majority of humankind, crime, punishment, and reform are still inextricably bound up with religious views about sin, judgment, and forgiveness." David R. Loy, *Healing Justice: A Buddhist Perspective*, *in* The Spiritual Roots of Restorative Justice, 81 (Michael L. Hadley ed., 2001). There are few, if any, institutions that can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame, and suffering than those of the religious community.

This Court has frequently taken notice of the opinions of religious organizations when confronting

issues involving contemporary standards of decency and morality. For example, in *Atkins v. Virginia*, this Court cited the brief of amici curiae filed by the United States Conference of Catholic Bishops and other religious organizations as "evidence" of a broad "social and professional consensus" against the execution of persons with mental retardation. 536 U.S. 304, 316 n.21 (2002); *see also Stanford v. Kentucky*, 492 U.S. 361, 388 n.4 (1989) (Brennan, J. joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (relying on the opinion of a coalition of religious groups when considering the constitutionality of the juvenile death penalty).

Amici, as members of the religious community, are uniquely positioned to provide invaluable guidance regarding the issue presented in these cases: whether sentencing juveniles to life imprisonment without the possibility of parole for non-homicide offenses is contrary to contemporary standards of decency and therefore violates the Eighth Amendment's prohibition of cruel and unusual punishment. Their religious traditions—Christianity, Judaism, Islam, and Buddhism—have played influential roles in societal discourses about morality and criminal punishment throughout history, and continue to do so today. An overwhelming majority of Americans continue to rely on the teachings and instructions of these faith traditions on matters of morality and justice.[2]

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[2] According to the 2008 American Religious Identification Survey, nearly 80% of American adults identified themselves as an adherent of at least one of the religious traditions represented by amici. Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey (2008), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

For the reasons set forth below, amici unanimously assert that imposing life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses is contrary to the values and beliefs of the faith traditions they represent. Such a punishment violates contemporary standards of decency and, accordingly, must be held unconstitutional.

II. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole for Non-Homicide Crimes Disregards the Special Status That Juveniles Are Accorded Due to Their Diminished Capacity

Juveniles are not simply small adults. They are still in the process of mental and physical development. They lack the wealth of life experience, appreciation of the consequences of their actions, and the maturity that adults possess. Consequently, juveniles are recognized as less able to control their impulses and to conform their conduct to the requirements of civilized society and as more likely to make poor decisions.

Throughout human history, social institutions and societies themselves have drawn distinctions between the behavior that is expected of children and of adults and have imposed different consequences when those expectations are not met. In particular, all of the religions represented by amici have recognized juveniles' special developmental status, assigned them less moral culpability, and accorded them more lenient treatment in criminal matters. Secular law at the state, federal, and international levels mirrors these distinctions. To condemn juveniles who commit non-

homicide offenses to spend their entire lives incarcerated is to disregard the accumulated experience of all of these societal institutions. Doing so is an act so far outside of the moral standards of modern American society as to constitute cruel and unusual punishment.

A. Christianity, Judaism, Islam, and Buddhism Accord Juveniles Special Treatment on Account of Their Lesser Mental Sophistication, Both Generally and with Respect to Criminal Matters in Particular

The fact that children are less mature and responsible than their adult counterparts is well-recognized within all of amici's religious traditions.[3] Children's view of the world, their understanding of moral behavior, and the degree to which they are able to comprehend the consequences of their actions, are far more limited than those of adults. As noted in the New Testament: "When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things." 1 Corinthians 13:11. Likewise, the Prophet Muhammad is recorded to have said that "the pen (of legal capacity and legal obligation) has been lifted from three (classes): the insane, until he regains intellectual capacity, the minor

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[3] Admittedly, variation exists among and within amici's various religions as to the exact age when one ceases being a juvenile and becomes an adult. *See, e.g.*, 4 Al-Fiqh al-Islami wa Adillatuh (Islamic Jurisprudence and its Proofs) (11 volumes) 2971 (Damascus: Dar al-Fikr al-Mu'asser, 1997) (looking to local culture to determine the line between being a juvenile and adulthood). This does not detract from the larger point, however, that all of amici's faith traditions draw this distinction.

until he reaches the age of majority, and the sleeping person until he awakens." 4 'Abd al Ghafar Sulayman al-Bandari (ed.) Sunan al-Nasa'i al-Kubra li Ahmad ibn Shu'ayb al-Nasa'i 324 ##7346 (Beirut: Dar al-Kutub al-'Ilmiya, 9th century reprint 1991).

These distinctions have been enshrined within amici's religious doctrines, as evidenced in the Talmud, which explains that because minors have limited mental capacity they are to be excluded from certain ritual activity: for example, they are prohibited from writing particular legal documents unless an adult co-writes such documents, and they are exempted from certain religious obligations. *Babylonian Talmud* ("*BT*") *Hagiga* 2b; *BT Gittin* 23a. Similarly, Islamic law states that minors are inherently deficient in judgment until they reach the age of majority. 8 Al-Mawsu'ah al-Fiqhiyyah 195-196 (Kuwait: Ministry of Awqaf [Religious Endowments], 1995).

Religious teachings concerning crime and punishment uniformly accord juveniles special treatment in light of their partially developed mental and moral state. It is a point of consensus in the Islamic legal tradition, for example, that minors as a class are not considered to hold full legal capacity and are therefore exempt from legal obligations and severe penalties. Al-Mawsu'ah al-Fiqhiyyah, *supra*, at 196. Consequently, the Islamic legal tradition prohibits the imposition of lifetime imprisonment without the possibility of parole on minors, as it is considered to be an extreme punishment greater than any crime that could be committed by an individual lacking full legal capacity. Similarly, minors, as a class, are also exempt

from the most dire forms of punishment under Jewish law. *BT Sanhedrin* 52b, 54a, 54b.

B. The Distinctions Drawn by Christianity, Judaism, Islam, and Buddhism with Respect to Juveniles Are Supported by Science and Mirrored in State and Federal Law, As Well As the Laws of Other Nations

Amici's faith traditions are not alone in according juveniles special treatment; society at large recognizes the meaningful differences between adults and juveniles. Scientific studies, for example, have confirmed what we all know from experience: the brain continues to develop through late adolescence, as do core mental functions like planning, judgment and emotional control. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, American Psychologist 58(12) 1009-18 (Dec. 2003).[4] These findings have led

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[4] *See also* MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief 3: *Less Guilty by Reason of Adolescence* (2006), *available at* http://www.adjj.org/content/page.php?cat_id=2&content_id=28; Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (Oct. 2005) (citing Jay N. Giedd, et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861(1999) and Kenneth K. Kwong, et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proceedings of the National Academy of Science 5675 (1992)), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.

researchers to conclude that juveniles should not be held to the same standards of criminal responsibility as adults, because adolescents' decision-making capacity is diminished, they are less able to resist coercive influence, they do not fully appreciate the negative consequences of their actions, they are less susceptible to deterrents, and their character is still developing. *See id.*

American law also draws many distinctions between adults and juveniles on account of children's reduced mental development. All fifty states have established minimum age requirements to vote,[5] marry,[6] join the military,[7] obtain a driver's license,[8] and consume alcohol.[9] The federal government makes similar distinctions, and even the United States Constitution itself imposes minimum age limitations for elected officials.[10] Underlying all of these laws is our collective belief that the physical and mental immaturity of youth requires special treatment because individuals are only able to

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[5] *See, e.g.*, Cal. Elec. Code § 2000 (2008); Fla. Stat. Ann. § 97.041 (2009); 25 Pa. Stat. Ann. § 2811 (2008).

[6] *See, e.g.*, Ind. Code § 31-11-1-4 (2009); Wash. Rev. Code § 26.04.010 (2009); Ohio Rev. Code Ann. § 3101.01 (2009).

[7] *See, e.g.*, Ga. Code Ann. § 38-2-3 (2009); N.Y. Mil. Law § 2 (Consol. 2009); 20 Ill. Comp. Stat. Ann. 1805/1 (2009).

[8] *See, e.g.*, Conn. Gen. Stat. § 14-36 (2009); Del. Code Ann. tit. 21, § 2710 (2009); Minn. Stat. § 171.04 (2009).

[9] *See, e.g.*, Vt. Stat. Ann. tit. 7, § 658 (2009); N.C. Gen. Stat. § 18B-302 (2009); R.I. Gen. Laws § 3-8-4 (2009).

[10] U.S. Const. art. I, §§ 2, 3; U.S. Const. art. II, § 1.

understand and anticipate the consequences of their actions upon the transition from childhood to adulthood. Indeed, this Court, in reversing a sentence of capital punishment for a defendant who was sixteen at the time he was convicted, has acknowledged the important differences between juveniles and adults:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)) (footnotes omitted); *see also Roper v. Simmons*, 543 U.S. 551, 569 (U.S. 2005) (relying on the "general differences between juveniles under 18 and adults" to hold that imposing the death penalty on any juvenile offender violated the Eighth Amendment).

The laws of other nations also recognize the special status of juveniles, as does international law. Essentially all nations have laws that, like the American laws

discussed above, restrict certain rights to adults because of their increased maturity and mental development.[11]

This international consensus regarding juveniles' developing status has also translated into universal special treatment for juveniles under criminal laws. To take one example, the United Nations General Assembly has adopted a sequence of resolutions stating that the primary aim of juvenile justice is not retribution but promoting the well-being of the juvenile, that long-term incarceration of juveniles does them great harm, and that confinement shall be imposed on juveniles for the shortest possible period, and only as a last resort. *See* G.A. Res. 40/33, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/33 (1985) (1985 Beijing Rules); G.A. Res. 45/113, U.N. GAOR, 45th, Sess., 68th plen. mtg., U.N. A/RES/45/113 (1990) (1990 U.N. Rules for the Protection of Juveniles Deprived of Their Liberty); G.A. Res. 45/112, U.N. GAOR, 45th Sess., Supp. No. 49A, at 201, U.N. Doc. A/45/RES/112 (1990) (1990 Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)). In addition, the Convention on the Rights of the Child, ratified by every nation except for the United States and Somalia, requires signatory states to give juveniles special treatment in criminal justice matters. *See, e.g.*, Convention on the Rights of the Child,

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[11] *See, e.g.*, Armed Forces Act, 2006, c. 52, § 328 (providing minimum age requirements for persons enlisting in the military in the United Kingdom), *available at* http://www.opsi.gov.uk/acts/acts.2006/pdf/ukpga_20060052_en.pdf.; Austl. Cap. Terr. Consolidated Acts, Liquor Act 1975, Part 10, Division 10.2, § 151-58 (establishing minimum age requirements for drinking alcoholic beverages in Australia), *available at* http://www.austlii.edu.au/au/legis/act/consol_act/la1975107/.

G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 37(c), U.N. Doc. A/RES/44/25 (1989; entry into force Sept. 2, 1990). ("Every child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons of his or her age.").

Further, there is near consensus among nations that it is never appropriate to sentence juvenile offenders to life imprisonment without the possibility of parole. The Convention on the Rights of the Child prohibits sentencing children to life imprisonment without the possibility of release for any crime, including homicide offenses. *Id.* art. 37(a). The United Nations General Assembly recently passed a resolution calling for the immediate elimination of sentences of life imprisonment without the possibility of release for all juveniles. G.A. Res. 61/146, ¶ 31, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/146 (2007).

According to a recent report, the United States is one of only two countries in which individuals who committed their underlying offenses while minors are currently serving such sentences. Center for Law and Global Justice, University of San Francisco School of Law, Report on Human Rights Violations, *Sentencing Our Children to Die in Prison*, Global Law and Practice 4 (2007). Subjecting juvenile offenders—particularly those who have not committed homicide offenses—to sentences that guarantee they will spend their entire lives incarcerated is far outside of international practice in every other nation in the world. *See also Roper v. Simmons*, 543 U.S. 551 (2005) ("It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain

fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

C. Sentencing Juveniles to Life Imprisonment Without the Possibility of Parole for Non-Homicide Offenses Constitutes Cruel and Unusual Punishment Because It Disregards the Longstanding Societal Consensus That Juveniles Merit Special Treatment

To impose the punitive sentence of life imprisonment without the possibility of parole—the most severe punishment in the American criminal justice system, other than capital punishment, *see Solem v. Helm*, 463 U.S. 277, 303 (1983)—on individuals under the age of eighteen is to ignore the special status that juveniles hold in our society due to their immaturity and inexperience. Mr. Graham was only sixteen years old at the time he committed the underlying offense that led to his sentence of life imprisonment without the possibility of parole; Mr. Sullivan was only thirteen years old when he committed his offense. Condemning Mr. Graham, Mr. Sullivan, and similar offenders to die in prison without the possibility of ever becoming eligible for release stands in clear violation of amici's religious traditions.

Such a punishment is especially inappropriate for juvenile offenders like Mr. Sullivan and Mr. Graham because their crimes, while grave, were non-homicides. Mr. Sullivan is one of only two thirteen-year-olds in the United States to have received such a sentence for an offense in which no one was killed. Brief of Petitioner-

Appellant at i, *Sullivan v. Florida*, No. 08-7621 (U.S. filed July 16, 2009). In light of this Court's holding in *Roper*, 543 U.S. at 579, that it is unconstitutional to impose the death penalty on individuals under the age of eighteen when their offenses are committed, life without the possibility of parole is the ***most*** severe sentence available to juvenile offenders in this country. Yet it is axiomatic within this country's legal system that only the most deserving class of offenders receive the most punitive sentences. *Cf. Kennedy v. Louisiana*, 128 S. Ct. 2641, (2008) (holding that it is unconstitutional to impose the death penalty on adults who have not committed capital murder). Sentencing juveniles who commit non-homicide offenses to life imprisonment without the possibility of parole violates that bedrock principle.

The overly punitive sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicide offenses fails to account for the inherent differences between youth and adults. Such blindness cannot be reconciled with amici's faith traditions or the morals and ethics of contemporary American society.

III. Imposing Life Imprisonment Without the Possibility of Parole on Juvenile Offenders Contravenes Fundamental Religious Values

In addition to being morally unjustifiable because it does not recognize the special status of children, such a sentence offends the well-established religious principle that all individuals—especially those who are weak and vulnerable, such as children—are entitled to mercy, forgiveness, and compassion. Moreover, the

sentence of life imprisonment without the possibility of parole also denies juvenile offenders the opportunity for meaningful rehabilitation and conflicts with the concept of restorative justice, which all of amici's faith traditions embrace. Any punishment that so thoroughly conflicts with the values and principles that have been adopted by all the religions represented by amici and embraced by a majority of Americans must violate contemporary "standards of decency."

A. Imposing Such a Punitive Sentence on Juvenile Offenders Contravenes Religious Teachings That Tell Us That All Individuals, and Particularly Juveniles, Are Deserving of Mercy, Forgiveness, and Compassion

Amici, despite the diversity within their beliefs and religious traditions, champion mercy, forgiveness, and compassion as fundamental values that must be extended to everyone.

First, each religion acknowledges the centrality of mercy. In Christianity, for instance, Jesus' self-sacrificial death on the cross for the sins of humanity is viewed as the ultimate act of mercy, *Titus* 3:5 ("[Jesus] saved us, not because of righteous things we had done, but because of his mercy."), and Christians are called to replicate his example in their daily interactions. *See, e.g.*, *Matthew* 5:7 ("Blessed are the merciful, for they shall obtain mercy."). Likewise, mercy is a foundational principle in Islam, *Qur'an* 7:156 ("My mercy encompasses all things"); *Qur'an* 6:54 ("Your Lord hath inscribed for Himself (the rule of) mercy . . . . He is Oft-Forgiving, Most Merciful."), and Muslims are obligated

to show mercy. Judaism depicts God as "merciful and gracious, long-suffering, and abundant in goodness and truth." *Exodus* 34:6. The *Talmud* discusses the idea of *imitatio dei*, that man is supposed to emulate God and be compassionate and merciful, *BT Shabbat* 133b, *JT Pe'ah* 1:1, and it commands judges to be merciful and compassionate when deciding cases. *See Sanhedrin* 29a.

Second, amici's religions also stress the importance of forgiveness, urging their adherents to forgive those who have wronged them. Jesus' admonition to his disciples to "turn the other cheek" is well known; the *Bible* also commands that we should "[b]ear with each other and forgive whatever grievances [we] may have against one another."[12] The *Qur'an* describes the righteous as those who "spend freely [in charity] whether in prosperity or adversity, restrain anger, and forgive others," 3:134. It also commands people to forgive each other: "Hold to forgiveness, enjoin what is right, and turn away from the ignorant." 7:199. While the *Qur'an* states that "the recompense for an injury is an injury equal thereto," it immediately continues to say "but if a person forgives and makes reconciliation, his reward is due from God, for God loveth not those who do wrong . . . indeed if any show patience and forgive that would truly be an exercise of courageous will and resolution in the conduct of affairs." 42:40-43.

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[12] The following, oft-repeated conversation between Jesus and his disciple Peter reveals the centrality of forgiveness in Christian theology: "Then Peter came up and said to him, 'Lord, how often shall my brother sin against me, and I forgive him? As many as seven times?' Jesus said to him, 'I do not say to you seven times, but seventy times seven.'" *Matthew* 18: 21-2.

Third, underlying the focus on mercy and forgiveness is the belief, found in all faith traditions represented by amici, that human action should be guided by compassion. For example, prominent Jewish philosopher and rabbi Maimonides once explained that "[t]he purpose of the laws of the Torah is to promote compassion, loving-kindness and peace in the world." Maimonides, *Yad Hachazakah, Hilchot Shabbat* 2:3; *see also Ethics of the Fathers* 1:2 ("On three things the world is sustained: on the Torah, on the (Temple) service, and on deeds of loving kindness."). Likewise, compassion is stressed within Islam as well. Muslims are encouraged to "urge each other to patience, deeds of kindness and compassion; indeed those are the companions of the right." *Qur'an* 90: 17-18. Similarly, the importance of compassion in Buddhism is exemplified by the teaching to "not show disregard for thy unhappy kindred, compassion for all creatures is the true religion." Aèvaghoùa, *The Buddha-Carita, or The Life of Buddha*, Book IX: 17 (Edward B. Cowell, ed. & trans., New Delhi 1977).

In short, religious texts make clear that each of these three values—mercy, forgiveness, and compassion—must guide interpersonal and societal relations, and are to serve as the bedrock principles for a just and fair society. These values are so essential that those who fail to apply them risk delegitimizing the sincerity of their claim of devotion. One Talmudic source explains:

> [I]f a person exhibits impudence, cruelty, or misanthropy, and does not perform acts of loving-kindness, one should strongly suspect

> that he is of non-Jewish descent; for Israel, the holy nation, has the three distinctive traits of "modesty, mercy, and loving-kindness."

Yevamot 79a. Similar concepts are found in all of amici's faith traditions.[13]

Inflicting the sentence of life imprisonment without the possibility of parole, the most severe punishment available to juvenile offenders, on a young person who has committed a non-homicide offense is an act without mercy, forgiveness, or compassion. This is especially true given that juveniles who commit serious crimes often come from disadvantaged backgrounds: many are poor, and frequently they have been the victims of abuse and neglect.[14] These are exactly the type of children amici's faith traditions stress are most deserving of kindness and compassion. *Cf.*, *e.g.*, *Psalms* 82:3 ("Defend the cause of the weak and fatherless; maintain the rights of the poor and oppressed."); *Qur'an* 2:83 ("[T]reat with

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[13] For example, Jesus criticized the Pharisees for emphasizing legalism over more fundamental concerns for mercy and compassion. *Matthew* 23:23 ("Woe to you, scribes and Pharisees, hypocrites! For you tithe mint, dill, and cumin, and have neglected the weightier matters of the law: justice and mercy and faith. It is these you ought to have practiced without neglecting the others.").

[14] *See* The Center for Law and Global Justice, University of San Francisco School of Law, Report on Human Rights Violations, *Sentencing Our Children to Die in Prison*, Global Law and Practice 20 (2007) (explaining that juvenile offenders often face "problems such as lack of familial support, insufficient access or motivation for education, poverty, and lack of access to employment opportunities").

kindness your parents and kindred, and orphans and those in need; speak fair to the people . . . and practice regular charity."); *James* 1:27 ("Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress."). Imposing such a harsh punishment on such a vulnerable population cannot be reconciled with the fundamental values represented by amici's faith traditions and broadly accepted by American society.

This does not suggest that juvenile offenders should be rendered immune from punishment. Amici agree that the law must be followed and that those who fail to comply should suffer sanction. But, in amici's religions, the sanction, must be tempered by mercy, forgiveness, and compassion in order to be just. A prominent rabbi, Emanuel Rackman, has observed that the notions of justice and charity are "grafted" together within the Jewish tradition; "[i]n the Bible one invariably finds the two words 'charity and justice' as a compound phrase." Martin Sicker, *The Political Culture of Judaism* 100 (2001). Similarly, St. Augustine once wrote:

> Fulfill, Christian judge, the duty of an affectionate father; let your indignation against their crimes be tempered by consideration of humanity; be not provoked by the atrocity of their sinful deeds to gratify the passion of revenge, but rather be moved by the wounds which these deeds have inflicted on their souls to exercise a desire to heal them.

Letter 133 from Saint Augustine to Marcellinus (A.D. 412), *in* 1 Nicene and Post-Nicene Fathers, First Series, Vol. 1 (J.G. Cunningham trans., Philip Schaff ed., 1887), *available at* http://www.newadvent.org/fathers/1102133.htm (revised and edited for New Advent by Kevin Knight).[15]

Imposing life imprisonment without the possibility of parole on juvenile offenders convicted of non-homicide offenses stands in marked contrast to the message of mercy, forgiveness, and compassion embraced by all of the religious traditions represented by amici. There is no mercy or compassion in sentencing an adolescent who, while still in the immaturity and indiscretion of youth, has made mistakes and broken the law, to a life confined within the walls of a prison. Such a punishment is cruel and unusual and undoubtedly violates contemporary "standards of decency."

B. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole Denies Them Their Potential for Rehabilitation and Development

When sentencing Mr. Graham to life imprisonment without the possibility of parole, the Florida court

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[15] Muslim jurists also agree that justice and mercy go hand in hand. The famous medieval jurist Ibn al-Qayyem explains that "Shari'ah law in its foundation and construction is based upon . . . [serving] public interest . . . and it is all justice and all mercy . . . ." 7 Al-Fiqh al-Islami wa Adillatuh (islamic Jurisprudence and its Proofs) (11 volumes) 5552 (Damascus: Dar al-Fikr al-Mu'asser, 1997).

concluded from his "escalating pattern of criminal conduct," that "there is nothing we can do for you." Brief of Petitioner-Appellant at 22, *Graham v. Florida*, No. 08-7412 (U.S. filed July 16, 2009). Such a statement epitomizes the travesty of imposing life imprisonment without the possibility of parole on juvenile offenders convicted of non-homicide offenses: it fails to recognize the tremendous potential that juveniles have to grow, develop, and be rehabilitated. The *Graham* court's nihilistic view of juvenile offenders is antithetical to the perspectives of amici's faith traditions and of American society at large.

Children, by definition, are in a state of partial and incomplete development. *See supra* pp. 5-10. Because they are still maturing and learning to interact with society, they are uniquely suited to rehabilitation if placed within the right environment. Many juvenile offenders have been raised in abusive or neglectful home environments and have lacked positive influences in their lives to guide them and prepare them to become productive members of society. Amici believe that it is possible to reform any juvenile offender over the course of his or her lifetime and prepare him or her to lead a responsible, low-abiding existence outside of prison.

In *Roper*, this Court adopted the same view, acknowledging juvenile offenders' potential for growth and rehabilitation:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will

> be reformed. Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

543 U.S. at 570 (quotation marks and citation omitted).

Amici embrace the notion that just punishment must allow for the offender to be rehabilitated and restored to the community when possible. For example, Jewish law states that the purpose of the judicial system is not merely to punish or exact revenge, but to facilitate human development and *tshuvah* ("returning from bad deeds" or "repentance"). Similarly, the Islamic legal concept of *ta'zir* punishment,[16] imposed for non-homicidal crimes, is concerned with both deterring the criminal from committing future crimes and reforming and rehabilitating him. Mohamed S. El Awa, *Punishment in Islamic Law* 96, (Indianapolis: American Trust Publications, 1982).

The focus on rehabilitation within amici's faith traditions is also evident through each of their embrace of the principle of "restorative justice." This concept involves constructing a system of justice "that moves from punishment to reconciliation, from vengeance against offenders to healing for victims, from alienation

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[16] The word *ta'zir* is derived from the Arabic verb *azar*, which means to prevent, to respect, and to reform. *See* Mohamed S. El Awa, *Punishment in Islamic Law* 96, (Indianapolis: American Trust Publications, 1982).

and harshness to community and wholeness, from negativity and destructiveness to healing, forgiveness, and mercy." Michael L. Hadley, *Introduction: Multifaith Reflection on Criminal Justice, in* The Spiritual Roots of Restorative Justice 8 (Michael L. Hadley ed., 2001). True restorative justice is achieved when an offender turns away from his or her misdeeds and returns to the community to contribute as an active member of society.[17]

In Buddhism, this type of justice is represented most vividly through the story of Angulimala, a merciless bandit and murderer, who abandons his life of lawlessness and violence after a peaceful encounter with the Buddha. *Theragatha* 866-91; *Majhima Nikaya*, Angulia Sutta. When the king and his subjects learn that Angulimala has been reformed, they decide that he has suffered enough and that there is no need to further punish him for his past wrongs and sins. *Id.* This story, one of the most important within the Buddhist tradition, "highlights the only reason Buddhism accepts for punishing an offender: to help re-

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[17] Restorative justice is a foundational principle in Islam as well. Mohamed S. El Awa, *Punishment in Islamic Law* 104 (Indianapolis: American Trust Publications, 1982). For example, in the Islamic legal tradition, the *ta'zir* punishment of lifetime imprisonment without parole is imposed on habitual criminals who cannot be reformed. *Id.* However, there is an important condition for the imposition of this punishment: it can only be applied as long as the reform of the offender is viewed as completely impossible. *Id.* It is presumed that all minors have the potential to reform their behavior and redeem themselves upon reaching adulthood. Consequently, Islamic law prohibits the imposition of lifetime imprisonment without parole on minors, as a punishment greater than any crime that could be committed by someone of such a status. *Id.*

form his or her character." David R. Loy, *Healing Justice: A Buddhist Perspective, in* The Spiritual Roots of Restorative Justice, 81 (Michael L. Hadley ed., 2001).

The sentences that Mr. Graham and Mr. Sullivan received cannot be reconciled with the principle of restorative justice because such sentences never give offenders the opportunity to rejoin society. It is impossible to create a fully actualized system of restorative justice without this possibility; in order to be fully effective, "restorative justice should not be allowed to end with punishment or at the walls of the prison." Luc Roberts & Tony Peters, *How Restorative Justice Is Able To Transcend the Prison Walls: A Discussion of the "Restorative Detention" Project, in* Restorative Justice in Context: International Practice and Directions 95, 98 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 2003).

The sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicide offenses is unjust because it does not reflect juveniles' vast potential for change and denies them any meaningful opportunity to ever rejoin society.

C. The Fundamental Values Espoused by Christianity, Judaism, Islam, and Buddhism Demand That Juvenile Offenders Like Mr. Sullivan and Mr. Graham Be Given the Possibility of Parole

In contemporary American society, both retribution and incapacitation are among several justifications for punishment, *see, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct.

2641, 2649 (2008) ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."); *United States v. LaBonte*, 520 U.S. 751, 779 (1997) ("the basic goals of punishment [are] . . . deterrence, incapacitation, just deserts, [and] rehabilitation"), and amici acknowledge that incarcerating juveniles who pose a danger to the public is recognized a valid penological goal. However, sentencing juveniles who are convicted of severe, but non-homicide, crimes to life imprisonment without the possibility of parole runs afoul of amici's shared belief that justice requires that this class of offenders be given the opportunity of release.

The institution of parole serves an important function within our criminal justice system. *See Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (explaining that "the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Under the systems of parole used by a number of states, "parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society." *Id.* at 477-78. Thus, parole boards and similar institutions and programs that allow for the conditional or early release of prisoners not only allow for correctional departments to make informed and individualized judgments about the continued threat that offenders pose to the public, but they also provide offenders with an opportunity to make a case for why, given their efforts at reform and rehabilitation, they are deserving of release.

Mr. Sullivan and Mr. Graham, under the sentences they are currently serving, will never have such an opportunity. Any efforts they have taken to atone for their crimes, seek rehabilitation, or lay the groundwork for leading a productive, responsible life outside of their prison walls cannot be factored into their punishment. They are joined by over one hundred other juveniles in this country who like them have not committed the most serious offense—homicide[18]—but can never hope for the possibility of release, even if they avail themselves of the full array of rehabilitative options available within prison.[19] It is simply impossible to reconcile amici's faith

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[18] A study prepared by Florida State University found that there are currently at least 111 juveniles convicted of non-homicide offenses serving sentences of life imprisonment without the possibility of parole. Paolo Annino, et al., Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.

[19] There is a broad variety of programs that take widely differing approaches to reforming and rehabilitating offenders, and the diversity of offerings continues to expand. *See, e.g.*, Barry Krisberg, *Reforming Juvenile Justice*, THE AMERICAN PROSPECT, August 14, 2005, *available at* http://www.prospect.org/cs/articles?article=reforming_juvenile_justice (discussing how many jurisdictions are embracing a federal initiative called Balanced and Restorative Justice, which provides "the youthful offender . . . a way to restore his or her role in the community" through, among other things, involving victims in the rehabilitation process); *The Right Model for Juvenile Justice*, N.Y. TIMES, Editorial, Oct. 28, 2007, *available at* http://www.nytimes.com/2007/10/28/opinion/28sun2.html (discussing another model, pioneered by Missouri and being imitated across the country, that does away with "mass kiddie prisons in favor

(Cont'd)

traditions with the imposition of this permanent, unforgiving sanction on individuals who, at the time of their respective offenses, were not even old enough to fully comprehend their actions and the attendant consequences.

Parole and similar programs are among the few places within our criminal justice system that allow for consideration of the values and principles discussed above: mercy, forgiveness, compassion, redemption, and restorative justice. In order for our nation's criminal justice system to comport with these values and principles, which have been embraced by a majority of the American people, juvenile offenders convicted of non-homicide offenses must be provided with the opportunity to demonstrate that they are no longer a danger to the community and can rejoin society.

(Cont'd)

of small community-based centers that stress therapy, not punishment" and that, to the extent possible, keeps young people "near their homes so their parents can participate in rehabilitation that includes extensive family therapy").

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court vacate Messrs. Graham and Sullivan's sentences on the ground that the imposition of life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses violates the Eighth Amendment's guarantee against cruel and unusual punishment.

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APPENDIX

APPENDIX

1. American Association of Jewish Lawyers and Jurists. The American Association of Jewish Lawyers and Jurists ("AAJLJ") is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the International Association of Jewish Lawyers and Jurists, which is based in Israel and was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The mission of AAJLJ is to promote an understanding of the principles of traditional Jewish law among the bar, the judiciary and the public, including an understanding of the relevance and applicability of Jewish law to current legal issues and controversies, through participation as amici in appropriate cases, educational programs and other means of outreach.

2. American Catholic Correctional Chaplains Association. The American Catholic Correctional Chaplains Association ("ACCCA") is a national Catholic organization committed to promoting the principles of restorative justice for all involved with, or affected by, the criminal justice system.

3. American Correctional Chaplains Association. The American Correctional Chaplain's Association ("ACCA"), an affiliate of the American Correctional Association, serves as a professional organization for pastoral care personnel in the corrections field. It provides a network for the sharing of information and resources amongst its members and with corrections administrators, and it formulates standards for

chaplaincy and religious programming in correctional facilities. ACCA strongly believes that the accommodation of spiritual development and religious study in the prison context are exceptionally valuable aids to rehabilitation.

4. American Friends Service Committee. The American Friends Service Committee ("AFSC"), the social justice and peace organization formed by the Religious Society of Friends (Quakers) in 1917, has worked with prisoners, their families, and prison officials since 1947. AFSC's work stems from the belief that the way a society treats people convicted of crimes is an indicator of the human values of that society and Quakers' belief in the intrinsic worth of all human beings.

5. Buddhist Peace Fellowship. The Buddhist Peace Fellowship ("BPF") was founded in 1978 to serve as a catalyst for socially engaged Buddhism. BPF envisions a future in which people from all backgrounds come into a heartfelt realization of our interconnection to each other and to the Earth. We believe that actions generated from this understanding will create societies guided by generosity, compassion, wisdom, and justice. We are committed to helping beings liberate themselves from the suffering that manifests in individuals, relationships, institutions, and social systems.

6. Church Women United. Since our founding in 1941, Church Women United ("CWU") has worked for and supported the rights of women and children. CWU strives to express God's love, mercy, kindness, and

forgiveness through its work for peace and justice, and we call upon the criminal justice system to do the same.

7. The Council of Churches of the City of New York, Inc. The Council of Churches of the City of New York, Inc., is the oldest ecumenical council in the United States. Founded in 1895, it is today a council of the major representative religious organizations representing the several Protestant and Orthodox denominations having ministry in the City of New York. It is governed by a Board of Directors comprised of the bishop or equivalent officer of each local diocese, association, synod, presbytery, conference, or district of its member denominations and of the president and executive officer of the local councils of churches serving in each of the boroughs of the City of New York.

8. Engaged Zen Foundation. The Engaged Zen Foundation ("EZF") is an American Buddhist group originally founded as a prison outreach group. Its experience working in prisons throughout the United States since 1994 has compelled it to expand its efforts to focus on the complete circle of human rights imperatives. EZF has called for a comprehensive investigation into the validity of the concept of "punishment" itself by religious people, scholars, psychologists and clinical researchers. EZF's experiences have brought the Foundation to question the efficacy of the criminal justice system's treatment of offenders and in particular the treatment of juvenile offenders who are most vulnerable.

Appendix

9. General Synod of the United Church of Christ. Amicus curiae General Synod of the United Church of Christ ("UCC") is the representative body of the national setting of the United Church of Christ and is composed of delegates chosen by its conferences from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by General Synod as described in the Bylaws of the UCC, and ex officio delegates. The UCC was formed in 1957, by the Union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make effective their common witness to Christ, and to serve God's people in the world. The UCC has 5,600 churches in the United States, with a membership of 1.2 million.

10. Islamic Shura Council of Southern California. The Islamic Shura Council is an umbrella organization of Mosques and Muslim organizations, serving more than half a million Muslims in Southern California.

11. Karamah: Muslim Women Lawyers for Human Rights. KARAMAH is a charitable, educational organization that focuses on the domestic and global issues of human rights, especially those of Muslim women. It is founded upon the ideal that education, dialogue, and action can counter the dangerous and destructive effects of ignorance, silence, and prejudice. KARAMAH envisions a world in which all human beings, regardless of their gender or other differences, enjoy

their God-given right to dignity, which cannot be achieved without liberty and justice. The name KARAMAH is rooted in the Qur'anic verse: "We have given dignity (karamah) to the children of Adam." (17:70).

12. Mormons for Equality and Social Justice. Mormons for Equality and Social Justice ("MESJ") is a grassroots organization of Latter-day Saint individuals who are "anxiously engaged" (D&C 58:27) in working for the gospel values of peace, equality, justice, and wise stewardship of the earth in a spirit of Christ-like charity and concern. As Latter-day Saints, we come from a heritage of people who had "a vision of a different world, a world where injustice and oppression, poverty and ignorance would be dispelled and a world where men and women would be brothers and sisters." Alexander B. Morrison, CHURCH NEWS, Oct. 14, 1995.

13. National Council of the Churches of Christ in the United States of America. The National Council of the Churches of Christ in the USA ("NCC") is a community of 35 national Christian denominations, communions and conventions with 45 million adherents in 100,000 local congregations located in every state. The Council publishes the Revised and New Revised Standard Versions of the Bible and the Yearbook of American and Canadian Churches, and is engaged in interfaith dialogue, education and communication projects. The Council's member churches also maintain a strong witness on the moral and ethical dimensions of national policy issues ranging from the environment and peace to poverty and religious liberty. This witness is

based on a carefully crafted body of agreement on these issues developed over many decades of work together.

14. National Council of Jewish Women. The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that NCJW resolves to work for "the recognition and protection of children by the legal system and the provision for their unique needs." Consistent with our Principles and Resolutions, NCJW joins this brief.

15. New Jersey Regional Coalition. The New Jersey Regional Coalition is a faith-based, grassroots organization comprised of groups from throughout New Jersey devoted to working together for the common good in eradicating all forms of segregation and in promoting equality in education, criminal justice, and wherever systemic inequality exists.

16. Office of Restorative Justice, Archdiocese of Los Angeles. The Office of Restorative Justice (ORJ) provides pastoral care for offenders, victims, and families of both. We employ education and outreach to effect changes in public policy and to transform the criminal justice system. We challenge the Church to respond to Jesus' invitation to walk with the prisoner

and comfort those who mourn. ORJ is a catalyst that sparks the radical transformation of Society's attitudes toward and treatment of offenders, victims, and families of both.

17. Prison Fellowship Ministries. Prison Fellowship Ministries is a tax-exempt, charitable religious organization, that ministers to prisoners, ex-prisoners and their families. Founded in 1976 PFM offers ministry in every state and in over 100 countries. It seeks to give offenders hope in the midst of their very difficult circumstances.

18. Progressive Jewish Alliance. The Progressive Jewish Alliance ("PJA") is a California-based social justice organization that educates, advocates and organizes on issues of peace, equality, diversity and justice. PJA serves as a vehicle for connecting Jews to the critical social issues of the day, to the life of the cities in which they live, and to the Jewish tradition of working for repair of the world (*tikkun olam).* Moreover, PJA is committed to the pursuit of a more just and humane world fashioned on principles of restorative, rather than retributive, justice.

19. Queens Federation of Churches, Inc. The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual

assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. We believe that a legal system that is mechanistically brutal, especially to children, lacks any moral claim to be a system of justice.

20. Rev. Dwight Lundgren. Rev. Dwight Lundgren currently serves as the director of Reconciliation Ministries for National Ministries, American Baptist Churches USA. While the American Baptist Churches USA does not have a Policy Statement of Resolution on the issue of life imprisonment for those of minor age, there are other policy statements and resolutions which reflect principles that would argue against such a practice. *See* American Baptist Policy Statement on Criminal Justice (7034:12/83); American Baptist Resolution on Restorative Justice (8212:11/01).

21. Sister JoAnne Talarico. As a 55 year member of the Roman Catholic Congregation of Humility of Mary (CHM) of Davenport, Iowa in good standing, I am called "to be attentive to the call of the spirit in the signs of our times, especially the needs of the poor and powerless . . . and to work for justice within the human family . . . ." CHM Mission Statement. For 20 years, I have been visiting a woman at the Iowa Correctional Institution for Women who was sentenced to life without parole at the age of 17. Up until that first encounter with the prison system, I had never given much thought to Juvenile Life Without Parole (JLWOP), but when I connected a real face to this issue, I felt called to pursue

it. As a Christian, I believe that Jesus gave us the supreme example of forgiveness in his work with the poor and powerless. Even though it is very difficult at times, I believe that I, along with our criminal justice system, am called to do the same.

22. Trinity United Methodist Church. Trinity United Methodist Church is a member of the Iowa Annual Conference of the United Methodist Church in good standing. As followers of Jesus Christ our faith is built on the foundation of belief in God's unfailing love for all God's children and God's grace which offers justice, redemption, and forgiveness to all. As United Methodists, our responsibilities to minister to children are spelled out in "The Social Principles of The United Methodist Church." They call for special attention to the rights of children and youth.

23. United Methodist Church, General Board of Church and Society. The General Board of Church and Society is the presence of The United Methodist Church on Capitol Hill. "The prime responsibility of the board is to seek implementation of the Social Principles and other policy statements of the General Conference on Christian social concerns. Furthermore, the board and its executives shall provide forthright witness and action on issues of human well-being, just, peace, and the integrity of creation that call Christians to respond as forgiven people for whom Christ died. In particular, the board shall conduct a program of research, education, and action on the wide range of issues that confront the Church." (2008 Book of Discipline).

AMICUS CURIAE BRIEF

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Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

On Writs of Certiorari to the District Court of Appeals of Florida, First District

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. BASED ON THE REAL TIME THE JUVENILE OFFENDER IS LIKELY TO SPEND IN PRISON, JLWOP SHOULD BE CONSIDERED "GROSSLY DISPROPORTIONATE" UNDER THIS COURT'S JURISPRUDENCE 7

II. "THE EVOLVING STANDARDS OF DECENCY" HAVE ESTABLISHED THAT NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP 10

III. NEITHER THE PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY PERMITTING THE OPPORTUNITY FOR PAROLE 15

IV. REVIEW OF INTERNATIONAL AUTHORITIES DEMONSTRATES OVERWHELMING OPPOSITION TO JLWOP 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Coker v. Georgia,
433 U.S. 584 (1977) 15

Enmund v. Florida,
458 U.S. 782 (1982) 12, 13

Ewing v. California,
538 U.S. 11 (2003) 7, 8, 9, 10, 14

Furman v. Georgia,
408 U.S. 238 (1972) 14

Gagnon v. Scarpelli,
411 U.S. 779 (1973) 19

Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex,
442 U.S. 1 (1979) 15

Harmelin v. Michigan,
501 U.S. 957 (1991) 7, 12, 13, 14

Hussain v. United Kingdom,
22 EHRR 1 (1996) 21

Hutto v. Davis,
454 U.S. 370 (1982) 8, 10

Johnson v. Texas,
509 U.S. 350 (1993) 11, 14

PA Bd. of Prob. and Parole v. Scott,
524 U.S. 357 (1998) 15

Roper v. Simmons,
543 U.S. 551 (2005) ..... *passim*

Rummel v. Estelle,
445 U.S. 263 (1980) 8, 9

Solem v. Helm,
463 U.S. 277 (1983) 8, 9

Trop v. Dulles,
356 U.S. 86 (1958) 6, 10, 20

U.S. CONSTITUTION, STATUTES, RULES & REGULATIONS

U.S. Const. amend. VIII ..... *passim*

U.S. Const. amend. XIV ..... *passim*

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37 Pa. Code § 63.5 (2009) 18

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Alaska Admin. Code 20.485 (2009) 18

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Mich. Admin. Code r. 791.7715, 7716 (2009) 16

Mich. Comp. Laws § 791.223 16

Mich. Comp. Laws § 791.234 (2009) 16

Regs. Conn. State Agencies § 54-124a(j)(1)-5(g)
(2009) 18

R.I. Gen. Laws § 13-8-14 (2008) 16

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

Wash. Admin. Code § 381-70-160 (2009) 18

OTHER AUTHORITIES

ABA 2008 Report with Recommendation #105C 4

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Youth in the Criminal Justice System: Guidelines for Policymakers and Practitionser (ABA 2001) 3

Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prison Release*, 13 Geo. J. on Poverty & Pol'y 219 (2006) 18

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief to express its views on the question whether a sentence of life imprisonment without the possibility of parole for a juvenile offender is permissible under the Eighth and Fourteenth Amendments.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its more than 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors and law students.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part, and that no such counsel or party, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn

Since its inception, the ABA has taken an active role in advocating for the improvement of the criminal justice system, with special interest in the improvement of the juvenile justice system. The ABA includes many members who are judges, prosecutors, and defense attorneys with significant experience and special expertise in the treatment of juvenile offenders under the law.[3] The Juvenile Justice Committee of the ABA's Criminal Justice Section is composed of lawyers who specialize in juvenile justice issues.

In conjunction with the Institute of Judicial Administration ("IJA"), the ABA spent over nine years developing standards for the administration of juvenile justice, which culminated in the publication in 1980 of the IJA/ABA *Juvenile Justice Standards* (the "Standards") in 20 volumes. These Standards flowed from an exhaustive historical, legal and criminological study of society's response to juvenile crime. The Standards reflect the expertise and knowledge of trained legal practitioners in a number of disciplines and are informed by the experience of related professions that work with juvenile offenders.

In 1997, in response to growing number of state statutes and policies that allowed the

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that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] As used in this brief, the term "juvenile" refers to individuals under the age of eighteen and "juvenile offender" refers to individuals who commit crimes or acts of delinquency while under the age of 18.

transfer of juvenile offenders to the adult criminal justice systems, the ABA created its Task Force on Youth in the Criminal Justice System. In 2001, this Task Force published its report, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (ABA 2001), in which the Task Force noted that, by 1997, the number of youths in adult prisons had reached 7,400 – double the number in adult prisons in 1985. *Id.* at 1. Further, the net result of these state policies was that, by 2001, at least 200,000 American juveniles were being tried as adults each year. *Id.*

The ABA drew upon this experience in its *amicus curiae* brief in *Roper v. Simmons*, 543 U.S. 551 (2005), in which this Court considered the constitutionality of the death penalty for juvenile offenders. In its brief, the ABA endorsed criminal justice policies, that accounted for factors unique to juveniles that affect their culpability, including the fact that juvenile offenders are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence, and limited in their ability to assist in their own defense. Br. of the American Bar Ass'n, No. 03-633, *Roper v. Simmons at 2* http://www.abanet.org/amicus/briefs98-03.html (last visited July 21, 2009). In the view of the ABA:

> The ABA recognizes that some juvenile offenders deserve severe punishment for their crimes. However, when compared to adults, juvenile offenders' reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others – renders them less

> responsible and less morally culpable than adults.

Id. at 3 (citing IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* at 3 (1980)).

Most recently, in February 2008, the ABA unanimously adopted policies addressing sentence mitigation for juvenile offenders.[4] *ABA 2008 Report with Recommendation #105C* at 2 (Policy adopted Feb. 2008) (the "Report").[5] As stated in the Report at 2, "The ABA's overall approach to juvenile justice policies has been and continues to be to strongly protect the rights of youthful offenders within all legal processes while insuring public safety."

As noted in the Report at 6, the ABA has opposed sentences of life without the possibility of parole for juvenile offenders since its adoption in 1991 of a policy endorsing the United Nations Convention on the Rights of the Child. Based on the ABA's long history of work in juvenile justice,

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[4] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Only recommendations adopted by the HOD become ABA policy. Recommendations may be submitted to the HOD by, among others, ABA delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited July 21, 2009).

[5] *Available at* http://www.abanet.org/leadership/2008/midyear/updated_reports/hundredfivec.doc. While only the Recommendation is approved by the HOD as ABA policy, the Report accompanying the Recommendation is instructive as to the considerations before the HOD.

the Report concluded that sentences for juvenile offenders must recognize that, no matter how adult-like their offenses, they are not adults. *Id.* at 6. That is, as this Court concluded in *Roper*, juvenile offenders have lesser culpability than adult offenders due to the typical behavioral characteristics inherent in adolescence. *Id.* (citing *Roper*, 543 U.S. at 569-70).

The ABA accordingly adopted as policy three principles: (1) sentences for juveniles should generally be less punitive than those for adults who have committed comparable offenses; (2) sentences for juveniles should recognize the key mitigating considerations particularly relevant to their youthful status, including those identified by the Court in *Roper*, 543 U.S. at 567-70, as well as the seriousness of the offense and the delinquent and criminal history of the juvenile; and (3) juveniles should generally be eligible for parole or other early release consideration at a reasonable point during their sentences and, if denied, should be reconsidered for parole or early release periodically thereafter.

These three principles, the ABA believes, are consistent with the Court's conclusions in *Roper* concerning the lesser culpability of juvenile offenders. The ABA believes that *Roper* and these principles are irreconcilable with a conclusion that a juvenile's life sentence is constitutionally permissible under the Eighth and Fourteenth Amendments when that sentence does not permit the possibility of parole.

SUMMARY OF ARGUMENT

The ABA respectfully submits that sentencing a juvenile offender to life in prison without the possibility of parole ("JLWOP") is not reconcilable with the lesser culpability of juvenile offenders. On that basis, settled doctrine establishes that such a sentence is not permissible under the Eighth and Fourteenth Amendments.

First, JLWOP should be considered a "grossly disproportionate" sentence because the "real time" of the juvenile offender's prison term, barring executive commutation, is the rest of the juvenile's life.

Second, "the evolving standards of decency," *Roper*, 543 U.S. at 561, citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion), have established that none of the standard justifications for criminal justice sentencing – retribution, deterrence, incapacitation and rehabilitation – are served by JLWOP.

Third, because the parole system provides sufficient safeguards to protect the public from those juvenile offenders who, as adults, are deemed to require continued imprisonment, JLWOP should not be permitted.

Finally, consideration of international authorities demonstrates an overwhelming opposition to JLWOP.

ARGUMENT

The ABA respectfully asserts that JLWOP cannot comport with this Court's conclusions in *Roper* concerning the lesser culpability of juvenile offenders, and therefore, should not be permissible under the Eighth and Fourteenth Amendments.

I. BASED ON THE REAL TIME THE JUVENILE OFFENDER IS LIKELY TO SPEND IN PRISON, JLWOP SHOULD BE CONSIDERED "GROSSLY DISPROPORTIONATE" UNDER THIS COURT'S JURISPRUDENCE.

Based on "the length of the prison term in real time, *i.e.*, the time that the offender is likely to actually spend in prison," *Ewing v. California*, 538 U.S. 11, 37 (2003) (Breyer, J., dissenting), JLWOP should be found to be "grossly disproportionate" under this Court's jurisprudence.

As this Court has stated, "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." *Ewing*, 538 U.S. at 23 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (internal quotation marks and citation omitted)). As the *Ewing* Court stated, "'The Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Id.* at 20 (quoting *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in judgment)). The proportionality standard, further, has been applied "to terms of years in a series of

cases beginning with *Rummel v. Estelle,* [445 U.S. 263 (1980)]." *Id.* at 20.

"Real time" in the case of JLWOP is, by definition, the rest of the juvenile's life, barring executive commutation. In *Ewing,* an adult was sentenced to 25 years to life under California's "three strikes" law, under which there was a possibility of parole. In affirming the sentence, Justice O'Connor noted that "federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." *Ewing,* 538 U.S. at 22 (quoting *Hutto v. Davis,* 454 U.S. 370, 374 (1982) (per curiam)). Justice O'Connor then compared *Rummel,* in which the defendant had received life in prison with the possibility of parole, with *Solem v. Helm,* 463 U.S. 277 (1983), in which an adult was sentenced to life in prison without possibility of parole, but with the possibility of executive commutation.

Justice O'Connor stated that *Solem* had set out three factors that may be relevant in determining whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 22 (quoting *Solem,* 463 U.S. at 292).

However, as Justice Breyer noted in his dissent, "The one critical difference that explains the difference in outcome [in *Rummel* and *Solem*]

is the length of the likely prison term measured in real time." *Id.* at 39. That is, in *Rummel,* the defendant's sentence included the possibility of parole; in *Solem,* it did not. *See also, Ewing,* 538 U.S. at 22 (O'Connor, J.) (stating that the *Solem* Court had specifically noted the contrast between the *Solem* and *Rummel* sentences).

Although most juvenile offenders are not sentenced under recidivist statutes, the rationale for these statutes supports the conclusion that JLWOP should be found to be "grossly disproportionate." As stated in *Ewing*:

> In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.

Id. at 29 (quoting *Rummel,* 445 U.S. at 276; *Solem* 463 U.S. at 296) (ellipsis original to *Ewing*).

The ABA asserts that if the difference in outcome in these cases was, in fact, the opportunity for parole for adult offenders "who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law," *Ewing,* 538 U.S. at 29, then juvenile offenders, regardless of the crime for which they are sentenced, should also be given a chance to show as adults in parole proceedings that their failure to conform was based on "youth and immaturity," *Roper,* 543 U.S. at 571.

While "federal courts should be reluctant to review legislatively mandated terms of imprisonment," *Ewing*, 538 U.S. at 22 (quoting *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam)), the ABA asserts that JLWOP is one category for which the challenge should be successful.

II. "THE EVOLVING STANDARDS OF DECENCY" HAVE ESTABLISHED THAT NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP.

In *Roper*, in considering whether the imposition of the death sentence on a juvenile offender violated the Eighth Amendment's prohibition against "cruel and unusual punishments," this Court affirmed the propriety and necessity of referring to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560-61 (citing *Trop*, 356 U.S. at 100-01 (1958) (plurality opinion)).

The *Roper* Court concluded that there is "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Id.* at 567.[6] Because of the

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[6] As the *Roper* Court stated, there are three general differences between juveniles and adults that demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders: (1) a lack of maturity and underdeveloped sense of responsibility; (2) vulnerability or susceptibility to negative influences and outside pressures, including peer pressure; and (3) the character of a juvenile is not as well formed as that of an adult. [footnote continued]

diminished capacity of juveniles, the Court concluded that "it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571.

In the view of the ABA, the Court's analysis in *Roper* applies with equal force to JLWOP, which is now the most severe penalty that may be imposed on a juvenile.[7] Because the "signature qualities of youth are transient," *Roper,* 543 U.S. at 570, citing *Johnson v. Texas*, 509 U.S. 350, 368

The resulting "diminished culpability of juveniles" is therefore based on the conclusions that (1) their irresponsible conduct is not as morally reprehensible as that of an adult; (2) their vulnerability and lack of control over their immediate surroundings mean they have a greater claim than adults to be forgiven for failing to escape negative influences in their environment; and (3) their struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. As the *Roper* Court concluded:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for the greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient: as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

Roper, 543 U.S. at 569-70 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

[7] The ABA suggests that JLWOP also be reviewed as an evolving standard by considering (1) a review of objective indicia of consensus, and (2) the exercise of the Court's own independent judgment. *See Roper*, 543 U.S. at 564.

(1993), none of the standard penological goals – retribution, deterrence, incapacitation or rehabilitation – are served. *See also Harmelin,* 501 U.S. at 1023 (White, J., dissenting) ("To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt") (citing *Enmund v. Florida,* 458 U.S. 782, 801 (1982)).[8] *See also Harmelin*, 501 U.S. at 1023 (White, J., dissenting) ("To be

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[8] In considering a juvenile offender's personal responsibility and moral guilt, the ABA asserts that the following should also be considered:

- Juveniles are more susceptible to coercion and more likely to be intimidated into making false confessions than are adults. Samuel Gross, *et al.*, *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2004) (concluding that 42% of the juveniles convicted during that period of time had falsely confessed to crimes they did not commit).

- Juveniles are generally less capable than adults of communicating with and giving meaningful assistance to their counsel; their lack of appreciation of long-term consequences impairs their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy; and they lack the basic skills to assist them in identifying exculpatory facts and effectively communicating them to their counsel. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 28 (Summer 2000).

- In eleven out of the seventeen years between 1985 and 2001, juveniles convicted of murder in the United States were more likely to receive sentences of life in prison without possibility of parole than were adults. United States. Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 2 (2005) (http://www.amnestyusa.org/countries/usa/clwop/report.pdf) (last visited July 19, 2009). Further, minority juveniles are far more likely to be sentenced to life without possibility of parole than their non-minority counterparts. *Id.*

constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt") (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

As the *Roper* Court stated, "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

As for deterrence, the *Roper* Court stated, "In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes. . . . Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 571, citing *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J. concurring).[9]

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[9] Although the *Roper* Court noted that, to the extent the juvenile death penalty might have a residual deterrent effect, JLWOP "is itself a severe sanction, in particular for a young person," *id.* at 572, studies indicate that there appears to be no significant difference in deterrence between a juvenile death penalty and JLWOP. See, e.g., MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, ISSUE BRIEF 3: "Less Guilty by Reason of Adolescence," *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited July 19, 2009) (concluding that juveniles' "lack of foresight, along with their tendency to pay more attention to immediate gratification than to long-term consequences, are among the factors that may lead them to make bad decisions").

The penological goal of incapacitation, to be sure, may be served when it is determined that a juvenile may be a threat to society. However, because "the signature qualities of youth are transient," *Roper*, 543 U.S. at 570, citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993), this does not support the juvenile's continued incapacitation throughout adulthood and into old age without an opportunity for reevaluation. *See Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption").

Finally, JLWOP is not supported by the penological goal of rehabilitation. The objective of rehabilitation is to return the offender to society. Return is, by definition, not possible under JLWOP. Further, as stated by Justice Marshall in his dissent in *Harmelin*, 501 U.S. at 1028:

> Because [a mandatory sentence of life imprisonment without the possibility of parole] does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.'

Id. (quoting *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

"A legitimate punishment must further at least one of these goals." *Ewing*, 538 U.S. at 25; *Harmelin*, 501 U.S at 999 (Kennedy, J., concurring

in part and concurring in judgment). This is because, as stated in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Eighth Amendment bars punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." JLWOP fails on both counts.

III. NEITHER THE PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY PERMITTING THE OPPORTUNITY FOR PAROLE.

Because the parole process has safeguards to protect the public, as well as recognized law enforcement and rehabilitative functions, neither the safety of society nor the objectives of the penal system would be compromised by permitting juvenile offenders the opportunity to be considered for parole.

As this Court and commentators have recognized, the parole system includes significant rehabilitative, law enforcement and cost control functions. *E.g. Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 13 (1979) (the "ultimate purpose of parole . . . is a component of the long-range objective of rehabilitation"); *PA Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 367 (1998) (explaining that "one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee"). *See also*, Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California's Parolees in Parole*

Revocation Proceedings, 33 W. St. U. L. Rev. 1, 3 (2005-2006) (explaining that parole also protects society through restrictions, reintegration services and by encouraging inmates to "conform their behavior while incarcerated under the threat of delaying or forfeiting early release from custody").

Moreover, the possibility of parole would not require the release of violent offenders considered a risk to the community. Parole involves significant checks to protect the public. Years may pass before an offender becomes eligible for parole consideration.[10] Parole boards consider a variety of factors in making parole recommendations, including the seriousness of the offense, the sentence length, the amount of time served, the offender's age, criminal history and prison behavior; participation in prison-based educational, vocational or rehabilitation programs; counseling reports, psychological evaluations, and the viability of parole plans, including where and how the inmate would live and support himself if released.[11] Generally, a majority of parole board panels must approve parole, and some states have imposed more stringent approval requirements for certain offenders.[12] Most inmates eligible for

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[10] *See, e.g.*, Ky. Rev. Stat. Ann. § 532.030 (2008); Mich. Comp. Laws § 791.234 (2009).

[11] *See, e.g.*, Cal. Penal Code § 3041(a) (2005); Cal. Code Regs, tit. 15 § 2281 (2009); Cal. Code Regs titl. 15 § 2402 (2009); Mich. Comp. Laws § 791.223; Mich. Admin. Code r. 791.7715, 7716 (2009); 37 Tex. Admin. Code § 145.2 (2009); R.I. Gen. Laws § 13-8-14 (2008).

[12] *See, e.g.*, Michigan Dept. of Corrections, The Parole Consideration Process, http://www.michigan.gov/corrections/0,1607,7-119-1435-22909--,00.html (last visited July 17, 2009)

parole consideration are not, in fact, granted parole.[13] Offenders whose requests for parole are rejected must wait a certain period of time, sometimes years, before they can be considered again.[14] Some states authorize the governor to reverse a decision granting parole, or impose delays or additional conditions on the terms of parole as an additional check to ensure that public safety is not compromised.[15]

Offenders granted parole are not released unconditionally. Rather, states impose conditions and restrictions on parolees. States may require the offenders to complete in-prison rehabilitation programs before releasing them on parole.[16] Once

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(explaining that decisions for Michigan prisoners serving life sentences must be made by a majority of all ten members of the Parole Board, rather than a majority of the three member panel considering parole for other offenders).

[13] *See* Office of Justice Programs, Dep't of Justice, Characteristics of State Parole Supervising Agencies (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/cspsa06.pdf (last visited July 20, 2009) (reporting 54% of adult parole inmates in 15 states were denied request for release on parole).

[14] Massachusetts, for example, provides that if parole is not granted at the initial parole release hearing, a parole review hearing occurs for most inmates annually thereafter, except where parole board members act to cause a review at an earlier time. Offenders sentenced as habitual criminals, committed as sexually dangerous persons or serving life sentences require subsequent hearings 2, 3 and 5 years, respectively, after the initial parole release hearing. 120 CMR 301.01 (2009).

[15] *See, e.g.*, http://www.cdcr.ca/gov/Parole/Life_Parole_Process/Index.html (last visited, July 21, 2009).

[16] *See, e.g.*, 37 Tex. Admin. Code § 145.2 (2009).

released, offenders may be confined to their homes with electronic monitoring and are typically restricted by any number of conditions, including drug counseling, treatment and testing requirements, restrictions on travel and on contact with certain persons, required regular contact with parole officers, payment of fines and restitution, and restrictions on the possession of firearms and other criminal behavior.[17]

Further, parole boards retain the right to revoke parole for the violation of any condition imposed, and many parole revocations result not from the commission of another crime, but from a failure to comply with a procedural requirement.[18] When offenders violate the conditions of their parole, the trier of fact generally will not apply the 'beyond a reasonable doubt' standard applied at the trial level; rather, the standard of proof employed in violation of parole hearings ranges from "clear and convincing evidence" to "probable cause," with most states using the "preponderance of the evidence" standard.[19] Moreover, "[i]n a revocation hearing . . . formal procedures and rules of

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[17] *See* 37 Pa. Code § 63.4 (2009); 37 Pa. Code § 63.5 (2009); 220 Ind. Admin. Code 1.1-3-1 – 1.1-3-10 (2009).

[18] *See generally*, Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prison Release*, 13 Geo. J. on Poverty & Pol'y 219 (Summer 2006).

[19] *See* 22 Alaska Admin. Code 20.485 (2009) (preponderance of the evidence standard sufficient to authorize decision to revoke parole); Wash. Admin. Code § 381-70-160 (2009) (same); Regs. Conn. State Agencies § 54-124a(j)(1)-5(g) (2009) (hearing examiner's finding on parole violation based on probable cause standard sufficient to order detention pending final revocation hearing).

evidence are not employed." *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973). Therefore, a state's ability to revoke parole based on even a procedural violation of parole conditions often is far easier, and requires a far lower burden of proof, than an adjudication on the underlying offense.

In contrast, for JLWOP sentences, the juvenile offenders will spend their lives in prison without having the opportunity to even be considered for parole. The ABA is not asserting that all juveniles serving JLWOP sentences will establish, at some point in their sentence, that they are entitled to parole. The ABA is asserting, however, that they should not be denied that opportunity.

It is undeniable that some juvenile offenders commit heinous crimes. However, as the *Roper* Court stated, "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." 543 U.S. at 573.

For the same reasons, the ABA submits that the courts and juries should not be permitted to impose JLWOP. Rather, the decision as to the appropriateness – or inappropriateness – of parole for juvenile offenders should be made at reasonable points in their sentences, based on the adults they have become.

IV. REVIEW OF INTERNATIONAL AUTHORITIES DEMONSTRATES OVERWHELMING OPPOSITION TO JLWOP.

The *Roper* Court stated that its conclusion that the juvenile death penalty was a disproportionate sentence found "confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." *Id.* at 575. The Court noted that, while this was not controlling, the Court had referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* (citing *Trop*, 356 U.S. at 102-03 (plurality opinion)).

Similarly, if the Court chooses to consider the laws of other countries and international authorities concerning JLWOP, the review will demonstrate an overwhelming opposition to JLWOP.

For example, as of 2005, only thirteen countries outside the United States had laws that theoretically permitted such a sentence, and there were perhaps only a dozen individuals serving sentences of JLWOP in three countries outside of the United States. Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 5 (2005) (hereinafter, "Human Rights Watch Report"). The numbers have continued to decline, as some of those countries have changed their laws and practices in the past three years to either

abolish the sentence or permit some review of an imposed sentence. Connie De La Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 Univ. S.F. L. Rev. 983, 1004-05 (Aug. 11, 2008) ("De La Vega and Leighton"); Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Parole in Illinois* (2008).

Further, the Convention on the Rights of the Child ("CRC") prohibits both the juvenile death penalty and JLWOP. Human Rights Watch Report at 98 (2005) (citing CRC, art. 37(a)). The CRC also requires states to consider "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." *Id.* (citing CRC, art. 40.1). As of 2005, 192 out of 194 countries were parties; the United States and Somalia are the two countries that have not ratified the CRC, although both have signed it. *Id.* at 99.

Moreover, in 1996, the European Court of Human Rights declared JLWOP illegal under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which forbids "inhuman or degrading treatment or punishment." *Hussain v. United Kingdom*, 22 EHRR 1, ¶ 53 (1996) (citing *The Convention for the Protection of Human Rights and Fundamental Freedoms*[20]). The *Hussain* decision is binding on the forty-seven European nations that have signed and ratified the convention.

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[20] *Available at* http://www.conventions.coe.int.

In April 2004, the Commission on Human Rights adopted a resolution which urged states to abolish JLWOP. *See* Human Rights Watch Report at 107 (2005).

In December 2006, the United Nations General Assembly, by a vote of 185 to one (the United States being the lone opposition vote) passed a resolution calling upon nations to abolish the juvenile death penalty and JLWOP. De La Vega and Leighton at 1012 (citing Rights of the Child, G.A., Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006)).

Finally, just last year, the United Nations Committee on the Elimination of Racial Discrimination, to which the United States is a party, determined that the racially disproportionate impact of JLWOP in the United States warranted recommending abolishing the sentence. U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008); De La Vega and Leighton at 1012.

As this Court concluded in *Roper*, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." 543 U.S. at 578.

CONCLUSION

For the reasons stated above, *amicus curiae* the American Bar Association requests that the judgments of the District Court of Appeals of Florida, First District be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

134

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IN THE

United States Supreme Court

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

(Additional Caption On the Reverse)

On Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF FOR THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide offense.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CITED AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE STRUCTURAL AND FUNCTIONAL IMMATURITIES OF THE ADOLESCENT BRAIN PROVIDE A BIOLOGICAL BASIS FOR THE BEHAVIORAL IMMATURITIES EXHIBITED BY ADOLESCENTS. 4

A. Adolescents Are Less Able Than Adults to Voluntarily Control Their Behavior. 5

B. Recent Studies of the Brain Have Established a Biological Basis for the Observed Immaturities in Adolescent Behavior. 13

1. Adolescent Brains Are Structurally Immature in Areas of the Brain Associated With Enhanced Abilities of Executive Behavior Control. 16

2. Adolescent Brains Tend to Be More Active Than Adult Brains in Regions Associated With Risky, Impulsive, and Sensation-Seeking Behavior and Less Active in Regions Associated With the Ability to Voluntarily Control Behavior. 24

TABLE OF CONTENTS

Page

CONCLUSION 31

TABLE OF CITED AUTHORITIES

Pages

Scientific Authorities

Adolphs, Ralph et al., *Fear and the Human Amygdala*, 15 J. NEUROSCI. 5879 (1995).....26, 28

Adolphs, Ralph, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIO. 169 (2002) 26

Adolphs, Ralph, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125 (1999).....27

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INTERESTS OF AMICI CURIAE*

The American Medical Association. With approximately 240,000 members, the American Medical Association is the nation's largest professional organization of physicians and medical students. Founded in 1847, its purpose is to promote the science and art of medicine and the betterment of public health.

The American Academy of Child and Adolescent Psychiatry. Founded in 1953, the American Academy of Child and Adolescent Psychiatry (the "AACAP") is comprised of over 7,500 child and adolescent psychiatrists and other interested physicians. Consistent with the focus of the juvenile court system on rehabilitation rather than retribution and multiple international treaties, including the UN Convention of Rights of the Child, the AACAP has adopted a policy statement strongly opposing the imposition of a sentence of life without the possibility of parole for crimes committed as juveniles. AACAP Policy Statement, June 2009, *available at* http://www.aacap.org/cs/root/policy_statements/life_without_parole_for_juvenile_offenders.

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* The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Each of the above-referenced *amici* is committed to the advancement of science. While not taking a formal position on whether sentencing a juvenile to a term of imprisonment of life without the possibility of parole violates the protections provided by the Eighth Amendment of the U.S. Constitution, *amici* submit this brief to describe the scientific findings of medical, psychiatric, and psychological research relevant to this issue.

SUMMARY OF ARGUMENT

The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures all over the world have presumed it for decades or more. And scientific evidence now sheds light on how and why adolescent behavior differs from adult behavior.

The differences in behavior have been documented by scientists along several dimensions. Scientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior. This is, in part, because they overvalue short-term benefits and rewards, are less capable of controlling their impulses, and are more easily distracted from their goals. Adolescents are also more emotionally volatile and susceptible to stress and peer influences. In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Behavioral scientists have observed these differences for some time, but only recently have studies provided an understanding of the biological underpinnings for why adolescents act the way they do. For example, brain imaging studies reveal that adolescents generally exhibit more neural activity than adults or children in areas of the brain that promote risky and reward-based behavior. These studies also demonstrate that the brain continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible for controlling thoughts, actions, and emotions.

While science cannot gauge moral culpability, scientists can shed light on some of the measurable attributes that the law has long treated as highly relevant to culpability and the appropriateness of punishment. This brief focuses on what science can tell us about the neurological, physiological, psychological, emotional, and behavioral development of adolescents from the perspective of researchers and medical professionals.

ARGUMENT

THE STRUCTURAL AND FUNCTIONAL IMMATURITIES OF THE ADOLESCENT BRAIN PROVIDE A BIOLOGICAL BASIS FOR THE BEHAVIORAL IMMATURITIES EXHIBITED BY ADOLESCENTS.

Although adolescents[1] can, and on occasion do, exhibit adult levels of judgment and control, their ability to do so is limited and unreliable compared to that of adults. Adolescents, as a group, are less capable than adults of accurately assessing risks and rewards; controlling their impulses; and recognizing and regulating emotional responses — in short, they are less consistent in their ability to self-regulate their behavior. *See* Point A, *infra*.

Moreover, recent advances in brain-imaging technology confirm that the very regions of the brain that are associated with voluntary behavior control and regulation of emotional response and impulsivity are structurally immature during adolescence. Studies have also revealed that these structural immaturities are consistent with age-related differences in both brain function and behavior. *See* Point B, *infra*.

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[1] There is a continuum of differences in brain maturation and cognitive abilities between the youngest and oldest of adolescents. All of the scientific conclusions recounted in this brief, however, are applicable to adolescents as a class—ranging from ages 12 to 17.

A. Adolescents Are Less Able Than Adults to Voluntarily Control Their Behavior.

Numerous studies of adolescent behavior over the last two decades confirm the stereotype that adolescents, as a group, are prone to making impulsive or reactive judgments. "Relative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking."[2] Sensation-seeking peaks during adolescence across cultures and species, and may be a normal part of development that promotes learning and independence.[3] Nevertheless, sensation-seeking behavior can result in actions that compromise survival (referred to as "risk-taking" behaviors) and involve sub-optimal decision-making. Risk-taking of all sorts — whether drunk driving, unprotected sex, experimentation with drugs, or even criminal activity — is so pervasive that "it is

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[2] Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n. 1 (2000); Lawrence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence of a Dual Systems Model*, 44:6 DEVELOPMENTAL PSYCHOL. 1774 (2008); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62-77 (2008); *see generally* Sarah Durston & B.J. Casey, *What Have We Learned About Cognitive Development from Neuroimaging?*, 44 NEUROPSYCHOLOGIA 2149 (2006).

[3] Beatrice Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, *in* FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 250 (Francisco Aboitiz and Diego Cosmelli eds., Springer Berlin Heidelberg 2009) (explaining that "these behaviors may be necessary to develop the social skills needed to gain independence in adulthood").

statistically aberrant to refrain from such [risk-taking] behavior during adolescence."[4] The difference between adolescent and adult behavior, however, is not a function of adolescents' inability to distinguish right from wrong or in their intellectual abilities *per se*, but rather from psychosocial limitations in their ability to consistently and reliably control their behavior.[5]

Specifically, adolescents are less able, on average, than adults to self-regulate, or "cognitively" control, their behavior.[6] In this sense, "cognitive control" refers to the ability to voluntarily behave in a goal-oriented manner that requires a plan to be executed, especially when presented with more

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[4] Spear, *supra* note 2, at 421; *see also* Casey (2008), *supra* note 2, at 65 ("[R]isk-taking appears to increase during adolescence relative to childhood and adulthood . . .. ").

[5] Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); *see also* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYMPOSIUM ON INTERFACES IN PSYCHOLOGY 66, 67 (N. Bell & R. Bell eds., 1993).

[6] *See* Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253 (2007); *see also* R.K. Lenroot & Jay N. Giedd, *Brain Development In Children And Adolescents: Insights From Anatomical Magnetic Resonance Imaging*, 30 NEUROSCI. & BEHAV. REVS. 718, 723 (2006); Luna, *supra* note 3, at 249, 51; *see also* Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 40-41 (2009) [hereinafter Steinberg, *Future Orientation*] ("[C]hanges in impulse control and planning are mediated by a 'cognitive control' network . . . which matures more gradually and over a longer period of time, into early adulthood.").

compelling short-term alternatives.[7] Scientists have identified various interrelated limitations in adolescents' self-regulatory abilities that contribute to their relative inability to control their impulses and their greater tendency to engage in risky or reckless behavior. To name just a few, adolescents (1) tend to be more strongly motivated by the possibility of reward than adults; (2) have greater difficultly controlling their impulses; and (3) have greater difficulty recognizing and regulating emotional responses. We take a closer look at each of these factors below.

Reward Sensitivity. One of the main reasons adolescents are more likely to engage in risky behavior than adults is that adolescents tend to experience heightened levels of sensitivity to rewards, especially to immediate rewards.[8] Placing a higher value on the potential reward leads to lower risk ratios for adolescents, relative to adults, and thus a higher likelihood of engaging in the risky behavior.[9] Adolescent behavioral research suggests that adolescents take more risks because they overvalue the potential reward, not because they are less able to appreciate the risks, as was once believed.[10] "[A]dolescents' greater involvement in risk-taking activity, as

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[7] *See* Luna, *supra* note 3, at 251.

[8] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57 (2009) [hereinafter Steinberg, *Adolescent Development*].

[9] *Id.* at 57-58.

[10] *Id.* at 58.

compared to adults, does not appear to stem from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk."[11] Rather, it appears that adolescents and adults perceive *risks* similarly, but they evaluate potential *rewards* differently, especially when the risky behavior is weighed against the cost.[12]

Impulse Control. "A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."[13] Impulse control means allowing a goal-directed response to override a more compelling, yet goal-inappropriate response.[14] The ability to control one's impulsive reactions to an event or problem is necessary to achieve adult levels of problem solving ability, logical reasoning,

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[11] Elizabeth Cauffman & Elizabeth Shulman, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, DEVELOPMENTAL PSYCHOL. (forthcoming 2009) (manuscript at 4); *see also* Steinberg, *Adolescent Development*, *supra* note 8, at 57.

[12] *See* Susan L. Andersen, *Trajectories of Brain Development: Point of Vulnerability or Window of Opportunity?* 27 NEUROSCI. AND BIOBEHAV. REVS 3, 3-18 (2003); Fulton Crews, Jun He & Clyde Hodge, *Adolescent Cortical Development: A Critical Period of Vulnerability for Addiction*, 86 PHARMACOLOGY BIOCHEMISTRY AND BEHAV. 189 (2007); Spear, *supra* note 2; Cauffman (2009), *supra* note 11, at 4; Steinberg (2008), *supra* note 2, at 1776 (linking lack of impulse control to sensation seeking behaviors).

[13] *See* Casey (2008), *supra* note 2, at 64.

[14] *See* Luna, *supra* note 3, at 251.

and the consistent exercise of good judgment.[15]

Adolescents have observable limitations in their ability to control their impulses. The relative inability of adolescents to control impulsive behavior is well-documented by studies on developmental changes in impulsivity and self-management over the course of adolescence.[16] "A number of classic developmental studies have shown that this ability develops throughout childhood and adolescence."[17] Capacity for self-direction has been shown to increase gradually throughout adolescence and into young adulthood.[18] Likewise, impulsivity tends to decline linearly between the ages of 10 and 30.[19] These findings indicate that adolescents have not yet attained adult levels of impulse control. In other words, adolescents are less able than adults to consistently reflect before they act.

Emotional Regulation. All individuals regulate their emotional responses to events. They increase or decrease their emotional

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[15] *See id.*

[16] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 58; *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538 (2007); Steinberg (2008), *supra* note 2, at 1772-74.

[17] *See* Casey (2008), *supra* note 2, at 64.

[18] *See* Steinberg, *Future Orientation*, *supra* note 6, at 28-29, 38-40.

[19] Steinberg (2008), *supra* note 2, at 1776; *see* Steinberg, *Adolescent Development*, *supra* note 8, at 57.

reactions to stimuli in accordance with their behavioral goals.[20] The ability to regulate one's emotions efficiently is crucial for mental and physical health as well as for appropriate social interactions, and impairment of this capability is associated with affective disorders and a variety of other maladaptive psychological conditions.[21] This ability, however, does not develop fully until young adulthood.[22] As a result, similar to their ability to control impulses, adolescents have less ability to regulate their emotional responses to stimuli than adults.[23]

This relative limitation is important for understanding adolescents' ability to voluntarily control their behavior. Indeed, many situations, particularly those involving social interactions, arouse adolescents' emotional system and impact their ability to make informed decisions about their actions. Peer pressure, for example, can arouse emotions of fear, rejection, or desire to impress friends that can undermine the reliability of adolescent behavioral control systems and

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[20] *See* Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 J. COGNITIVE NEUROSCI. 776 (2007); Kelly Anne Barnes et al., *Developmental Differences in Cognitive Control of Socio-Affective Processing*, 32:3 DEVELOPMENTAL NEUROPSYCHOL. 787 (2007).

[21] *Id.* at 776.

[22] *See* Casey (2008), *supra* note 2, at 65.

[23] Isabelle M. Rosso et al., *Cognitive And Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360-61 (2004).

result in actions taken without full consideration or appreciation of the consequences.[24]

Each of these attributes continues to develop throughout adolescence and early adulthood, and is critical to the ability to effectively and consistently control one's behavior.[25] The developmental immaturities that adolescents exhibit with respect to each of these attributes compound to make them particularly prone to engage in risky and sensation-seeking behavior.

Researchers have also found that these limitations are especially pronounced when other factors — such as stress, emotions, and peer pressure — enter the equation. These factors affect everyone's cognitive functioning, but they operate on the adolescent mind differently and with special force.

The interplay among stress, emotion, cognition, and voluntary behavior control in teenagers is particularly complex — and different from adults. Stress affects the ability to effectively regulate behavior as well as the ability to weigh costs and benefits and override impulses with rational thought.[26] Adolescents are more susceptible to stress from daily events than adults, which

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[24] *See* Steinberg (2007), *supra* note 16, at 1536-38 (explaining that "resistance to peer influence increases linearly over the course of adolescence, especially between ages 14 and 18").

[25] *See* Casey (2008), *supra* note 2, at 68.

[26] *See* Spear, *supra* note 2, at 423; Lita Furby & Ruth Beyth-Maron, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 22 (1992).

translates into a further distortion of their already skewed cost-benefit analysis.[27]

Emotion, like stress, also plays an important role in the ability to voluntarily control behavior, influencing decision-making and risk-taking behavior.[28] Because of both their greater stress and more drastic hormonal fluctuations, and their relative inability to consistently regulate their emotional responses, adolescents are more emotionally volatile than adults — and children, for that matter.[29] As a result, adolescents tend to experience emotional states that are more extreme and more variable than those experienced by adults.[30]

In sum, the conclusion of the scientific research is that, for a variety of interrelated reasons, adolescents, as a group, cannot be expected to behave or make decisions in the same way as adults.

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[27] *See* Spear, *supra* note 2, at 423; Furby, *supra* note 26, at 22.

[28] *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011-13 (2003).

[29] *See* Spear, *supra* note 2, at 429.

[30] *See id.* at 429; Cauffman (2000) *supra* note 5, at 743-45, 756-57, 59.

B. Recent Studies of the Brain Have Established a Biological Basis for the Observed Immaturities in Adolescent Behavior.

Modern brain research technologies have developed a body of data from the late 1990s to the present that provides a compelling picture of the inner workings of the adolescent brain.[31] Indeed, brain imaging data provides convergent evidence for the ways in which adolescents are still immature.[32] Developmental neuroscience has now gathered extensive evidence that both the structure of the adolescent brain, and the way it functions, are immature compared to the adult brain.

This insight emerges from sophisticated and non-invasive brain imaging techniques performed by high-resolution structural and functional magnetic resonance imaging ("MRI") and other technologies.[33] These imaging techniques are a

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[31] *See* Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?* 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (reviewing results of MRI studies of brain development in childhood and adolescence); Michael S. Gazzaniga et al., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 20-21, 138 (2d ed. 2002).

[32] *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004).

[33] "MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the earth's. Each type of tissue responds differently, emitting

quantum leap beyond previous mechanisms for assessing brain development. Before the rise of neuroimaging, the understanding of brain development was gleaned largely from post-mortem examinations.[34] Modern imaging techniques, however, have begun to shed light on how a live brain operates, and how a particular brain develops over time.[35]

Technological breakthroughs have not only enabled scientists to confirm some of what was previously known or believed, but have also provided new evidence that has changed the way scientists understand the development of the

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characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth." Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347, 1348 (1989); *see also* Yurgelun-Todd, *supra* note 6, at 251-52 (explaining that "structural MRI and functional MRI (fMRI), have become important modalities for research on brain development as they have been able to provide a more detailed picture of how the brain changes. The application of these methods to the study of children and adolescents provides an extraordinary opportunity to advance our understanding of neurobiological changes and functional abilities associated with the brain.").

[34] *See* Gazzaniga, *supra* note 31, at 63.

[35] *See generally* Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCI. 8819 (2001).

human brain as it progresses from childhood through adolescence and into adulthood.[36] "Structural brain imaging studies in normal children and adolescents have been helpful in relating the dramatic maturation of cognitive, emotional, and social functions with the brain structures that ultimately underlie them."[37]

In this regard, two complementary observations have been especially revealing. First, the parts of the brain that work together to support the control of behavior, including the prefrontal cortex (which comprises roughly the front third of the human brain), continue to mature even through late adolescence.[38] Second, in making behavioral choices, adolescents rely more heavily than adults on systems and areas of the brain that promote risk-taking and sensation-seeking behavior.

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[36] *See* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859 (1999); *see also* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861 (1999).

[37] Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCI. 309 (2003); *see also* Gogtay, *supra* note 32, at 8177.

[38] *See* Casey (2008), *supra* note 2, at 68.

1. Adolescent Brains Are Structurally Immature in Areas of the Brain Associated With Enhanced Abilities of Executive Behavior Control.

When it comes to "response inhibition, emotional regulation, planning and organization," the so-called executive functions, a crucial part of the brain is the prefrontal cortex.[39] The prefrontal cortex is associated with a variety of cognitive abilities,[40] including those associated with voluntary behavior control and inhibition[41] such

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[39] Sowell (1999), *supra* note 36, at 860; *see* Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12:1 DEVELOPMENTAL SCI. 55, 56 (2009) (explaining that "[n]europsychological and neuroimaging studies have shown that prefrontal cortex is strongly implicated in relational reasoning."); *see also* Gazzaniga, *supra* note 31, at 75; Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360-61 (2004) (finding a correlation between frontal lobe development in adolescents, response inhibition and social anxiety levels); *see generally,* Silvia A. Bunge et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 NEURON 301 (2002).

[40] *See* B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000).

[41] *See* R. Dias et al., *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex With an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing*, 17 J. NEUROSCI. 9285 (1997); Durston, *supra* note 27, at 1016; *see also* Yurgelun-Todd, *supra* note 6, at 253.

as risk assessment,[42] evaluation of reward and punishment,[43] and impulse control.[44] More generally, other functions associated with the prefrontal cortex include decision-making,[45] the ability to judge and evaluate future consequences,[46] recognizing deception,[47] responses to positive and negative feedback,[48] working memory,[49] and making moral judgments.[50]

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[42] *See* Facundo Manes et al., *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002).

[43] *See* J. O'Doherty et al., *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999).

[44] *See* Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198-99 (2000).

[45] *See* Samantha B. Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUMAN NEUROSCI. 7 (2008) (finding that important changes in the prefrontal cortex during adolescence lead to the development of logical reasoning abilities); *see also* Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCI. 428 (1998).

[46] *See* Bechara (2000), *supra* note 44.

[47] *See* D. D. Langleben et al., *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727 (2002).

[48] *See* R. Elliott et al., *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 NEUROPSYCHOLOGIA 1395 (1997).

[49] *See* Luna, *supra* note 3, at 264.

The brain's frontal lobes are still structurally immature well into late adolescence,[51] and the prefrontal cortex is "one of the last brain regions to mature."[52] This, in turn, means that "response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood."[53]

The adolescent's frontal lobes, and specifically the prefrontal cortex, are underdeveloped in two distinct ways, each of which directly affects brain functioning. First, pruning is incomplete. Second,

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[50] *See* Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657 (2001); Steve W. Anderson et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCI. 1032 (1999).

[51] *See* Gogtay, *supra* note 32, at 8174 (subjects of study aged 4 to 21 years); Giedd, *supra* note 36, at 861 (subjects of study aged 4.2 to 21.6 years); Sowell (1999), *supra* note 36, at 860-61 (subjects of study aged 12 to 16 and 23 to 30 years); *see also* Sowell (2001), *supra* note 35, at 8026 (noting pronounced brain maturational processes continuing into post-adolescence; subjects of study aged 7 to 30 years); Sowell (2003), *supra* note 37, at 309 (subjects of study aged 7 to 87 years).

[52] Casey, *supra* note 40, at 243; *see also* Gogtay, *supra* note 32, at 8175.

[53] Sowell (1999), *supra* note 36, at 860; *see also* Kenneth E. Towbin & John E. Schowalter, *Adolescent Development*, *in* PSYCHIATRY 145, 151-52 (Allan Tasman ed., 2d ed. 2003).

This paper recognizes the link between "improvement during adolescence in specific cognitive skills such as organizing information, conceptualization, perspective taking, and social perception, to structural changes in frontal cortical and subcortical structures." *Id.* at 152.

myelination is incomplete. We discuss each in turn.

Pruning. Gray matter, which comprises the outer surfaces of the brain, is composed of cells called neurons that perform the brain's tasks, such as the higher functions that are carried out in the prefrontal cortex.[54] As the brain matures, gray matter *decreases*[55] through a process called pruning. Just as the pruning of a rose bush strengthens the remaining branches, the pruning of excess neurons and connections which make up the gray matter leads to greater efficiency of neural processing and strengthens the brain's ability to reason and consistently exercise good judgment.[56] Thus, pruning establishes some pathways and extinguishes others, enhancing overall brain functioning.

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[54] *See* Gazzaniga, *supra* note 31, at 64-65; *see* Eric R. Kandel et al., PRINCIPLES OF NEURAL SCIENCE 9 (James H. Schwartz & Thomas M. Jessel, eds., McGraw-Hill 2000).

[55] *See* Durston, *supra* note 31, at 1014; Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48:5 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 465, 469 (2009).

[56] *See* Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 BRAIN & COGNITION 73 (2002) (subjects of study aged 10 to 22 years); Casey, *supra* note 40, at 241 ("findings are consistent with the view that increasing cognitive capacity during childhood coincides with a gradual loss rather than formation of new synapses . . ."); *see also* Daniel J. Siegel, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 13-14 (Guilford Press 1999).

Scientists have known about pruning for decades,[57] but modern brain imaging technology has provided important insights into the process.[58] Until MRI technology emerged, the common wisdom was that the volume of gray matter spurted only once, shortly after birth, and then declined gradually over time. Brain scans have revealed a more complicated reality: In particular regions of the brain, gray matter blossoms once again later in childhood.[59] Gray matter volumes peak during the ages from 10-20 years,[60] and the prefrontal cortex is one of the places where gray matter increases — before adolescence — and

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[57] *See generally* Peter R. Huttenlocher, *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 BRAIN RES. 195 (1979).

[58] *See, e.g.*, Sowell (2002), *supra* note 35, at 4.

[59] *See* McGivern, *supra* note 56, at 85; *see also* David N. Kennedy et al., *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 DEVELOPMENTAL SCI. 268, 274 (2002).

> Studies showed . . . nonlinear changes in cortical gray matter, summarized as a preadolescent increase followed by a postadolescent decrease. Further localization of these changes indicated that the frontal and parietal lobe peaked at about age 12, the temporal lobe at about age 16, and the occipital lobe continued its increase through age 20, although the confidence intervals on these observations are large.

Giedd, *supra* note 36, at 861.

[60] *See* Giedd, *supra* note 36, at 861; McGivern, *supra* note 56, at 85; Yurgelun-Todd, *supra* note 6, at 252, 55.

then gets pruned over time, beyond adolescence.[61] The prefrontal cortex is also one of the last regions where pruning is complete and this region continues to thin past adolescence.[62] This means that one of the last areas of the brain to reach full maturity, as measured by pruning, is the region most closely associated with risk assessment, impulse control, emotional regulation, decision-making, and planning — in other words, the ability to reliably and voluntarily control behavior.[63]

Myelination. Another important measure of brain maturity is myelination.[64] Myelination is the process by which the brain's axons are coated with a fatty white substance called myelin. Myelin surrounds the axons, which are neural fibers that use electrical impulses to carry

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[61] *See* Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 339 (2008).

[62] A study by the National Academy of Sciences measured gray matter density in individuals longitudinally from childhood to early adulthood and concluded that "the [gray matter] maturation ultimately involves the dorsolateral prefrontal cortex, which loses [gray matter] only at the end of adolescence." Gogtay, *supra* note 32, at 8175.

[63] *See id.* at 8177 (explaining that "[l]ater to mature were areas involved in executive function"); *see also* Michael C. Stevens et al., *Functional Neural Networks Underlying Response Inhibition in Adolescents and Adults*, 181 BEHAV. BRAIN RESEARCH 12 (2007).

[64] *See* Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND 144 (Oxford Univ. Press, 2001); *see also* Sowell (2001), *supra* note 32, at 8819; Sowell (2003), *supra* note 37, at 311; Yurgelun-Todd, *supra* note 6, at 253.

information across long distances, and insulates the pathway, speeding the neural signal along the pathway.[65] "The presence of myelin makes communication between different parts of the brain faster and more reliable."[66] Myelination of "white matter"[67] continues through adolescence and into adulthood.[68]

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[65] *See* Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231-32 (2004) (explaining that "the physiological effects of increases in axon thickness and myelination are similar in that they both increase conduction speed."); Gazzaniga, *supra* note 31, at 31, 48-49.

[66] Goldberg, *supra* note 64, at 144.

[67] White matter is the tissue that composes the pathways between brain regions and that permits communication and interaction within the brain and between the brain and the body. *See* Gazzaniga, *supra* note 31, at 70, 72. For example, the corpus callosum, a critical white matter structure, bridges the two halves of the frontal lobes, permitting and regulating communication between the two halves of the brain. *See* Tomas Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. 1908 (1999).

[68] *See* Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231-32 (2004); Durston, *supra* note 31, at 1014; Sowell (1999), *supra* note 36, at 860; Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES OF NEUROLOGY 874, 885 (1994) (after age 20 white matter volume did not fluctuate until about age 70; subjects of study aged 3 months to 70 years).

As measured by myelination, different parts of the brain mature at different rates.[69] Brain imaging data, supported by data gathered through the older autopsy technique,[70] provides credible evidence that the prefrontal cortex is still developing well into adolescence and beyond and is among the last portions of the brain to mature.[71] In other words, development of the region of the brain associated with voluntary behavior control (*i.e.*, risk assessment, impulse control, and emotional regulation) is not complete until late adolescence or beyond.

Myelination also increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior.[72] These structural changes are believed to underlie the functional integration (discussed below) of frontal regions with the rest of the brain.[73] The functional improvement of the

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[69] *See* Sowell (2003), *supra* note 37, at 311; Sowell (2002), *supra* note 35, at 4; Towbin & Schowalter, *supra* note 53, at 151.

[70] *See* Paus, *supra* note 67, at 1908.

[71] Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004) (noting that different parts of the brain undergo myelination and pruning at different rates, and finding that the higher-order cortices mature later than lower-order cortices."); *see also* Sowell (1999), *supra* note 36, at 859; K. Rubia et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCI. & BIOBEHAV. REVS.13 (2000) (subjects of study aged 12 to 19 and 22 to 40 years).

[72] *See* Luna, *supra* note 3, at 257.

[73] *See id.*; *see also* Giedd, *supra* note 55, at 467.

connections between the various regions of the brain is believed to result from myelination that occurs during adolescence and is necessary for improved abilities of reliable self-control and better decision-making.[74] For example, recent research on the neural underpinnings of resistance to peer influence in adolescence indicates that improvements in this capacity may be linked to the development of greater connectivity between brain regions, and likely facilitates the better coordination of affect and cognition.[75] More generally, however, the development of improved self-regulatory abilities during and after adolescence is positively correlated with white matter maturation through the process of myelination.[76]

2. Adolescent Brains Tend to Be More Active Than Adult Brains in Regions Associated With Risky, Impulsive, and Sensation-Seeking Behavior and Less Active in Regions Associated With the Ability to Voluntarily Control Behavior.

The brain is a complex network of interrelated parts. Each part is associated with different

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[74] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 56; B. Luna & J. A. Sweeney, *The Emergence of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 ANNALS N.Y. ACAD. SCI. 296-309 (2004); Damien A. Fair et al., *Development of Distinct Control Networks Through Segregation and Integration*, 104 PROC. NAT'L ACAD. SCI. U.S. 13507 (2007).

[75] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 56.

[76] *See* Nagy, *supra* note 65, at 1231-32.

functions and works in conjunction with other parts to form systems. In general, the two neurobiological systems that inform our understanding of adolescent behavior, as discussed above in Point A, are (1) the socioemotional system, which is localized in the limbic and paralimbic regions of the brain; and (2) the cognitive control system, which is generally comprised of regions of the frontal lobes, and specifically, the prefrontal cortex.[77] The differences between adolescent and adult behavior correlate with their respective and disparate reliance on each of these systems and their related brain structures.[78]

The structural immaturities of the adolescent brain discussed above represent only one dimension of the immaturity of the adolescent brain. Developmental neuroimaging studies demonstrate that the regions of the brain associated with voluntary behavior control mature structurally at the same time as specific changes occur in how the brain functions.[79] These findings

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[77] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 54.

[78] Stephanie Burnett et al., *Development During Adolescence of the Neural Processing of Social Emotion*, 21:9 J. COGNITIVE NEUROSCI. 173 (2009); S J Blakemore, *Adolescent Development of the Neural Circuitry for Thinking About Intentions*, 2:2 SOC. COGNITIVE & AFFECTIVE NEUROSCI. 130 (2007).

[79] Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision Making*, 47:10 J. CHILD PSYCHOL. & PSYCHIATRY 1023, 1024 (2006); *see also* Liston C. Watts et al., *Frontostriatal Microstructure Predicts Individual Differences in Cognitive Control*, 16:4 CEREBRAL CORTEX 553 (2006); B.J. Casey et al.,

reveal that adolescents and adults exhibit different patterns of brain activity during decision-making tasks and provide insight into the neural underpinnings of the risky, impulsive, and sensation-seeking behavior of adolescents.[80]

Studies show that the socioemotional system, which is responsible for motivating risky and reward-based behavior, develops earlier than the cognitive control system, which regulates such behavior. Furthermore, during adolescence, the socioemotional system continues to develop more quickly than the cognitive control system.[81] The result is that adolescents experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior.

The earlier development of the socioemotional system is evident in a number of areas of the brain. Among these are the amygdala and the

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Contribution of Frontostriatal Fiber Tracts to Cognitive Control in Parent–Child Dyads With ADHD, 164:11 AM. J. PSYCHIATRY 1729 (2007).

[80] Krain, *supra* note 79; *see also* Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26:25 J. NEUROSCI. 6885 (2006); Todd A. Hare et al., *Biolgical Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63:10 BIOLOGICAL PSYCHIATRY 927 (2008).

[81] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 54; *see also* Monique Ernst et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 199 (2009).

nucleus accumbens. An imbalance of dopamine and serotonin levels in the adolescent brain also contributes to the relative dominance of the adolescent socioemotional system.

Amygdala. The amygdala is associated with aggressive and impulsive behavior.[82] The amygdala is "a neural system that evolved to detect danger and produce rapid protective responses without conscious participation."[83] It dictates instinctive gut reactions, including fight

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[82] *See generally* Jan Gläscher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCI. 10274 (2003); Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIO. 169 (2002); Gazzaniga, *supra* note 31, at 553-72; K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002); Goldberg, *supra* note 64, at 31; Kevin S. LaBar et al., *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998); Richard D. Lane et al., *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437, 1441 (1997); Hans C. Breiter et al., *Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression*, 17 NEURON 875 (1996); Steinberg, *Future Orientation*, *supra* note 6, at 40.

[83] Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 1 (1999) (study found that adolescents 12-17 years old showed significant amygdala activation in response to a task that required the judgment of fearful facial affect); *see also* William D.S. Killgore & Deborah Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004); Phan, *supra* note 82, at 336

or flight responses.[84] The amygdala is also a key component of circuitry involved in assessing salience, or the importance of environmental stimuli to survival, and is generally associated with processing emotional responses to a perceived danger.[85]

The prefrontal cortex — the primary region associated with self-regulation and the cognitive control system — modulates function in the amygdala[86] to which it is strongly connected.[87] A still-maturing prefrontal cortex exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature prefrontal cortex.[88]

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[84] *See* Goldberg, *supra* note 64, at 31; Phan, *supra* note 82, at 336.

[85] *See* Giedd (2008), *supra* note 61, at 338.

[86] *See* Mario Beauregard et al., *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCI. 165RC (2001); Ahmad Hariri et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000).

[87] Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125-26 (1999); *see also* Joseph LeDoux, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 303 (1996).

[88] *See* Neir Eshel et al., *Neural Substrates of Choice in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270-71 (2007) (reporting prefrontal brain areas associated with higher-order cognition, emotional regulation, reward values, and behavior control are some of the last to mature and that this lag in maturation may explain why adolescents demonstrate poor decision-making); *see also* Gargi Talukder,

Nucleus Accumbens. The nucleus accumbens, on the other hand, is associated with reward processing. Its primary function is to process emotional response to a potential reward.[89] Studies show that when making decisions, "relative to children and adults, adolescents show exaggerated activation of the accumbens, in concert with less mature recruitment of top-down prefrontal control."[90] This exaggerated activity is consistent with the tendency of adolescents to overvalue rewards in risk-reward assessment and provides an anatomical basis for the "increased impulsive and risky behaviors observed during [adolescence]."[91]

Dopamine and Serotonin. Dopamine is a neurotransmitter known to be involved with pleasure and motivation and plays a critical role in the functioning of the developing adolescent brain.[92] Around the time of puberty, adolescents experience "a rapid and dramatic increase in dopaminergic activity within the socioemotional system."[93] Because dopamine plays a critical role in the brain's reward circuitry this increase in

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Decision-Making Is Still a Work in Progress for Teenagers, Report dated July 2000 at http://www.brainconnection.com; *see also* Spear, *supra* note 2, at 440 (reporting Dr. Yurgelun-Todd's research); *see also* Adolphs (1995), *supra* note 81, at 5889.

[89] Galvan, *supra* note 80, at 6890.

[90] *See* Casey, *supra* note 2, at 69.

[91] *See id.* at 69-70.

[92] *See* Andersen, *supra* note 12, at 3-18; Crews, *supra* note 12, at 189-199; Spear (2000), *supra* note 2, at 417-63.

[93] Steinberg, *Adolescent Development*, *supra* note 8, at 54.

activity is likely to promote reward-seeking behavior.[94] At the same time, adolescents have correspondingly lower levels of serotonin, a neurotransmitter known to support inhibitory control.[95] This imbalance between lower levels of serotonin and higher levels of dopamine during adolescence correlates with the observed prevalence of risky and impulsive decision making by adolescents.

In sum, adolescent behavior is characterized by a hyperactive reward-driven system (involving the nucleus accumbens), a limited harm-avoidant system (involving the amygdala), and an immature cognitive control system (involving the prefrontal cortex).[96] As a result, adolescent behavior is more likely to be impulsive and motivated by the possibility of reward, with less self-regulation and effective risk assessment.

Adolescence is a time of great physiological and psychological development. It is also a time marked by impulsive, risky, and sensation-seeking behavior. Scientific research has shed light on the biological mechanisms that help to explain this behavior. The latest scientific

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[94] *Id.* at 258; *see* Luna, *supra* note 3, at 258.

[95] *See* Luna, *supra* note 3, at 258; R. Andrew Chambers, Jane R. Taylor & Marc N. Potenza, *Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability*, 160 AM. J. PSYCHIATRY 1041 (2003).

[96] Monique Ernst et al., *Triadic Model of the Neurobiology of Motivated Behavior in Adolescence*, 36 PSYCHOL. MED. 299, 300-02 (2006).

research on the development of the adolescent brain establishes that "the brain systems that are crucial for exerting cognitive control over behavior and processing rewards are still immature during adolescence."[97] "These immaturities result in a system that is able to exert cognitive control, but in an inconsistent manner with limited flexibility and motivational control."[98] In other words, "the basic elements are established, but refinements are needed to support the necessary efficiency in circuit processing to establish reliable executive control."[99] As one researcher put it, the process of adolescent development is akin to "starting the engines without a skilled driver behind the wheel."[100]

CONCLUSION

While not formally supporting either party in these cases, the *amici* hope that the Court will consider the scientific evidence presented here in

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[97] *See* Luna, *supra* note 3, at 258; *see also* Ryan L. Muetzel et al., *The Development of Corpus Callosum Microstructure and Associations With Bimanual Task Performance in Healthy Adolescents*, 39:4 NEUROIMAGE 1918 (2008); Elizabeth A. Olson, *White Matter Integrity Predicts Delay Discounting Behavior in Adolescents: A Diffusion Tensor Imaging Study*, 21:7 J. COGNITIVE NEUROSCI. 1406 (2008); Elizabeth A. Olson, *Delay and Probability Discounting Behavior in Healthy Adolescents: Associations With Age, Personality Style, and Other Measures of Executive Function*, 43:7 PERSONALITY AND INDIVIDUAL DIFFERENCES 1886 (2007).

[98] *See* Luna, *supra* note 3, at 258.

[99] *Id.*

[100] Steinberg, *Adolescent Development*, *supra* note 8, at 56.

its deliberations about whether, in the present case, the Eighth Amendment (1) requires that these defendants be held to a different standard of culpability from that which applies to adults and (2) prohibits the imposition of a sentence of life without the possibility of parole on an adolescent offender.

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,327 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 23, 2009.

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AMICUS CURIAE BRIEF

134

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IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND MENTAL HEALTH AMERICA AS AMICI CURIAE SUPPORTING PETTITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY 6

A. Developmental Psychology And Social Science Research Confirms That Juveniles Are Less Mature, More Vulnerable, And More Changeable Than Adults 7

1. Juveniles have a lesser capacity for mature judgment 7

2. Juveniles are more vulnerable to negative external influences 15

3. Juveniles' unformed identity makes it less likely that their offenses evince a fixed bad character and more likely that they will reform 19

B. Juveniles' Psychosocial Immaturity Is Consistent With Emerging Research Regarding Brain Development 22

TABLE OF CONTENTS—Continued

Page

II. SENTENCING THE JUVENILE OFFENDERS IN THESE CASES TO DIE IN PRISON WITH NO OPPORTUNITY TO DEMONSTRATE REFORM IS A DISPROPORTIONATE PUNISHMENT 28

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

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INTEREST OF AMICI CURIAE[1]

The American Psychological Association is a voluntary nonprofit scientific and professional organization with more than 152,000 members and affiliates. Since 1892, the Association has been the principal organization of psychologists in the United States. Its membership includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.[2]

An integral part of the Association's mission is to increase and disseminate knowledge regarding human behavior and to advance psychology as a science, profession, and means of promoting health, education, and human welfare. Based on the well-developed body of research distinguishing the developmental characteristics of juveniles from those of adults, the Association has endorsed the policy reflected in the United Nations Convention on the Rights of the Child, which rejects life imprisonment without possibility of release for offenses committed by persons below 18 years of age.

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Amici acknowledge the assistance of Laurence Steinberg, Ph.D., Thomas Grisso, Ph.D., Joel Dvoskin, Ph.D., and Brian Wilcox, Ph.D., in the preparation of this brief.

Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

The American Psychiatric Association, with roughly 35,000 members, is the principal association of physicians who specialize in psychiatry. It has an interest in this Court's understanding of the lessons of scientific study and professional experience as the Court applies constitutional principles to individuals who often are patients of the organization's members.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with 147,000 members and 56 chapters throughout the United States and abroad. NASW conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on relevant issues of importance. NASW opposes any legislation or prosecutorial discretion permitting children to be charged and punished under adult standards.

Mental Health America (MHA) (formerly known as the National Mental Health Association) is the oldest mental health advocacy and education organization in the United States. Its board and staff are comprised of professionals with expertise in the diagnosis and treatment of mental illnesses, persons with mental illnesses, and other persons with expertise in mental health public policy. MHA is interested in ensuring that determinations about criminal sanctions imposed upon juveniles reflect the scientific consensus regarding juveniles' ability to understand the nature and consequences of their acts, their response to deterrence, and the likelihood that they can be successfully treated or rehabilitated.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Roper* v. *Simmons*, this Court held that imposition of the death penalty on those under the age of 18 violated the basic precept that punishment should be proportionate to the culpability of the offender. 543 U.S. 551, 568-575 (2005). The Court explained that juveniles differ from adults in several ways that—without excusing their crimes—reduce juveniles' culpability and undermine any justification for definitively ending their free lives: they lack adults' capacity for mature judgment; they are more vulnerable to negative external influences; and their characters are not yet fully formed. *Id.* at 569-570. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 570 (quoting *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)). Juveniles' vulnerability and lack of control over their surroundings "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their ... environment." *Id.* And "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of [an] irretrievably depraved character." *Id.*

Research in developmental psychology and neuroscience—including the research presented to the Court in *Simmons* and additional research conducted since *Simmons* was decided—confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less ori-

ented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity. Research also demonstrates that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. *Simmons*, 543 U.S. at 569. Finally, because juveniles are still in the process of forming a coherent identity, adolescent crime often reflects the "signature"—and transient—"qualities of youth" itself, *id.* at 570, rather than an entrenched bad character. Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not.

Consistently with these recognized developmental characteristics of adolescents, recent neuroscience research shows that adolescent brains are not yet fully developed in regions related to higher-order executive functions such as impulse control, planning ahead, and risk evaluation. That anatomical immaturity is consonant with juveniles' demonstrated psychosocial (that is, social and emotional) immaturity.

This Court held in *Simmons* that juveniles' developmental characteristics mitigated their culpability and made death a disproportionate punishment for juvenile offenders. Those same characteristics support the conclusion that sentencing juveniles to die in prison for the crimes at issue here is likewise a disproportionate pun-

ishment. While this Court has recognized that imposition of the death penalty raises special concern and calls for special precautions in light of death's finality and irreversibility, it has also recognized that the Eighth Amendment forbids any punishment that is seriously disproportionate to the culpability of the offender. A sentence of life imprisonment without the possibility of parole, like a sentence of death, is in a very real sense final: it condemns the offender to die in prison without affording him any opportunity to demonstrate a reformed moral character that might warrant release. And that sentence is particularly harsh as applied to a juvenile, who will never experience free adulthood.

Yet juveniles' immaturity and vulnerability mean that "the case for retribution is not as strong with a minor as with an adult." *Simmons*, 543 U.S. at 571. Moreover, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* Finally, the imposition of life without parole for a crime committed as a juvenile—a sentence that rejects the possibility of redemption—cannot be reconciled with juveniles' unformed characters and the likelihood that they will change as adults. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. In cases like those presented here, condemning an immature, vulnerable, and not-yet-fully-formed adolescent to die in prison is a constitutionally disproportionate punishment.

ARGUMENT

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY

In *Simmons*, this Court concluded that developmental differences between juveniles, including 16- and 17-year-old adolescents, and adults both diminish juveniles' blameworthiness for their criminal acts and enhance their prospects of change and reform.[3] Based on the scientific evidence presented by Simmons and his amici, the Court concluded that these differences between juvenile and adult offenders were "marked and well understood." 543 U.S. at 572. Continuing research in developmental psychology and neuroscience reinforces that conclusion, confirming that the three developmental characteristics of juveniles that *Simmons* identified—their immaturity, their vulnerability, and their changeability—render them, as a group, very different from adults. As this Court has recognized, those

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[3] In this brief, we use the terms "juvenile" and "adolescent" to refer to individuals between the ages of 12 and 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Simmons*, 543 U.S. at 574. Likewise, younger adolescents differ in some respects from the 16- and 17-year-olds discussed in *Simmons*. Nonetheless, because those under 18, on the whole, share certain developmental characteristics that mitigate their culpability, and because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," this Court concluded in *Simmons* that it was appropriate to draw the line for death-eligibility at age 18. *Id.* The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

differences are central to the calculus of culpability and the proportionality of punishment imposed on juvenile offenders.

A. Developmental Psychology And Social Science Research Confirms That Juveniles Are Less Mature, More Vulnerable, And More Changeable Than Adults

1. Juveniles have a lesser capacity for mature judgment

As this Court recognized in *Simmons*, adolescents have a significantly diminished capacity for mature judgment as compared to adults, and as a result are more likely to engage in risky behaviors. "[A]s any parent knows and as ... scientific and sociological studies ... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" 543 U.S. at 569 (quoting *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)).

As *Simmons* noted, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 339 (1992)). Indeed, such behavior is "virtually a normative characteristic of adolescent development."[4] Juveniles' risky behavior frequently includes criminal activity; in

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[4] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 344 (1992).

fact, "numerous ... self-report studies have documented that it is statistically aberrant to refrain from crime during adolescence."[5] When crime rates are plotted against age, both the total number of offenses and frequency of offending are highest during adolescence.[6] Both violent crimes and less serious offenses "peak sharply" in late adolescence—around age 17[7]—and "drop precipitously in young adulthood."[8] Studies show a steep decrease in antisocial behavior after age 17, as adolescents mature.[9]

Adolescents' striking tendency to engage in risky and even illegal behavior stems at least in part from their lesser capacity for mature judgment. Research has shown that adolescents' decision-making differs

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[5] Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 685-686 (1993); *see also* Terrie E. Moffitt, *Natural Histories of Delinquency, in Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3, 29 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994).

[6] Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 4.

[7] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 675; Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 4, 7; Arnett, *supra* note 4, at 343; *see also* DOJ Statistical Briefing Book, *available at* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20040801 *and* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05305.asp?qaDate=20040801 (last visited July 20, 2009) (statistics showing that arrests for both serious violent crimes and property crimes peak in late adolescence).

[8] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 675; Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 4, 7.

[9] Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 7.

from that of adults in several respects: adolescents are less able to control their impulses; they weigh the risks and rewards of their conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even late adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity.

First, empirical research confirms that adolescents, including older adolescents, are more impulsive than adults and less able to exercise self-control. For example, one study of maturity of judgment found that adolescents, including 17-year-olds, scored significantly lower than adults on measures of "temperance," which included "impulse control" and "suppression of aggression."[10] A more recent study examining differences in impulsivity between ages 10 and 30, using both self-report and performance measures, similarly concluded that impulsivity declined throughout that period, with "gains in impulse control occur[ring] throughout adolescence" and into young adulthood.[11] "[T]he develop-

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[10] Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000).

[11] Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychol. 1764, 1774-1776 (2008); *see also* Adriana Galvan et al., *Risk Taking and the Adolescent Brain: Who is at Risk?*, 10 Developmental Sci. F8, F13 (2007) (in study of individuals aged 7 to 29, finding that impulse control continues to develop over the course of adolescence and early adulthood); Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual Differences 681, 684-686 (2007) (reporting significant decline in

ing adolescent can only learn his or her way to fully developed control by experience. This process will probably not be completed until very late in the teen years.... [E]xpecting the experience-based ability to resist impulses ... to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."[12]

Second, adolescents generally do not perceive and evaluate the costs and benefits of their actions in the same way adults do. "In general, adolescents use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults."[13] For example, one study comparing adolescent and adult decision-making found that when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely than adults to mention possible long-term consequences, to evaluate both risks and benefits,

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impulsivity from ages 14-16 to 20-22 on two different impulsivity scales).

[12] Franklin E. Zimring, *Penal Proportionality for the Young Offender, in Youth on Trial* 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[13] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1012 (2003); *see also* Arnett, *supra* note 4, at 350-353 (summarizing evidence that adolescents' poor capacity for assessing probabilities plays a role in their reckless behavior); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 265, 268 (2001); Susan G. Millstein & Bonnie L. Halpern-Felsher, *Perceptions of Risk and Vulnerability, in Adolescent Risk and Vulnerability* 15, 34-35 (Baruch Fischoff et al. eds., 2001).

and to examine possible alternative options.[14] A forthcoming study of performance on a gambling task likewise found that, in a group of more than 900 individuals aged 10 to 30, adolescents and adults displayed "significant differences" in their behavior relative to risk and reward: while adolescents "may attend more to the potential rewards of a risky decision than to the potential costs, adults tend to consider both."[15] The study concluded that decision-making with regard to risk and reward "improves throughout adolescence," likely "due not to cognitive maturation but to changes in affective processing"—that is, the ability to regulate responses to emotional and social influences.[16] Adolescents' less mature weighing of risk and reward may lead them to be more likely to engage in criminal activity, as well as other kinds of risk-taking.[17]

Finally, juveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that

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[14] Halpern-Felsher & Cauffman, *supra* note 13, at 261, 264-270 (comparing 12th-graders with mean age of 17.5 to adults with mean age of 23). Even greater differences prevailed between adults and younger adolescents. *See id.*

[15] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Test*, Developmental Psychol. 1, 11, 14 (forthcoming 2009).

[16] *Id.* at 14.

[17] Arnett, *supra* note 4, at 344, 350-351 (noting that adolescents' distortion of perceived risks and rewards may explain why half or more adolescents reported driving while intoxicated, engaging in sex without contraception, illegal drug use, or some form of minor criminal activity).

they will fully apprehend the potential negative consequences of their actions.[18] Moreover, adolescents are less able than adults to envision and plan for the future, a capacity still developing during adolescence.[19] The study of maturity of judgment, discussed above, found that adolescents' future orientation is weaker than adults': that study, which compared maturity of judgment in over 1,000 adolescents and adults, found that even 17-year-olds scored lower than adults on measures of "perspective," which encompassed "the ability to see short and long term consequences," as well as the ability to "take other people's perspectives into account."[20] Similarly, studies have shown that, among 15- to 17-year-olds, realism in thinking about the future increases with age, and that the skills required for future planning continue to develop until the early 20s.[21]

The ability to resist impulses and control emotions, the ability to gauge risks and benefits as an adult would, and the ability to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to

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[18] *Id.* at 351-352.

[19] *See, e.g.*, Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 28-29 (1991); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 30, 35-36 (2009).

[20] Cauffman & Steinberg, *supra* note 10, at 746, 748, 754 & tbl. 4 (comparing adults with 12th-graders with mean age of 17.5).

[21] Nurmi, *supra* note 19, at 28-29; *see also* Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, *supra* note 19, at 35-36.

make mature, fully considered decisions.[22] Empirical research confirms that adolescents—even older adolescents—have not fully developed these abilities and hence lack an adult's capacity for mature judgment.[23]

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[22] Cauffman & Steinberg, *supra* note 10, at 741, 756 (finding a correlation between "responsibility," "temperance," and "perspective" and mature decision-making regarding antisocial or risky behavior).

[23] The dissent in *Simmons* criticized the American Psychological Association for allegedly having taken inconsistent positions regarding adolescent maturity in *Simmons* and in a previous case, *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990), raising the question whether parental notification posed an undue burden on a minor girl's right to obtain an abortion. 543 U.S. at 617-618 (Scalia, J., dissenting). The Association's briefs in *Simmons* and *Hodgson*, however, addressed different questions and accordingly focused on distinct aspects of mature judgment. *Hodgson* addressed *competence* to make medical decisions, which can be made in a relatively unhurried manner in consultation with medical professionals, and thus focused on adolescents' *cognitive* abilities, noting that by mid-adolescence those abilities approximated those of adults. By contrast, the question in *Simmons*, as here, was the degree of adolescent *culpability* and (relatedly) adolescents' potential reformability when they commit criminal acts, acts that often result from impulsive and ill-considered choices driven by *psychosocial* immaturity. As discussed further below, cognitive capabilities mature before an adolescent has acquired the psychosocial capacities necessary for impulse control, self-government, and mature assessment of future consequences in the face of social and emotional pressures. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, Am. Psychologist (forthcoming 2009) at 10; *see also* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 226-235 (1995). Moreover, because culpability and competence are distinct, adolescents' psychosocial immaturity mitigates their culpability (and enhances their prospects of reform) even if it does not render them incompetent for all purposes. *Cf. Tennard* v. *Dretke*, 542 U.S. 274, 288 (2004).

"[I]t is clear that important progress in the development of [social and emotional maturity] occurs sometime during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."[24]

It should be noted that the multiple abilities that contribute to mature judgment develop at different rates. Sound judgment requires both cognitive and social and emotional skills, but the former mature sooner than the latter. Studies of general cognitive capacity show an increase from pre-adolescence until about age 16, when gains in cognitive capacity begin to plateau.[25] As discussed above, however, social and emotional maturity continues to develop throughout adolescence. Thus, older adolescents (aged 16-17) might have logical reasoning skills that approximate those of adults, but

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[24] Cauffman & Steinberg, *supra* note 10, at 756, 758 (finding that the most dramatic increase in psychosocial maturity occurs between the ages of 16 and 19); *see also* Halpern-Felsher & Cauffman, *supra* note 13, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence.").

[25] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 343-344 (2003) (16- to 17-year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities); Daniel P. Keating, *Cognitive and Brain Development, in Handbook of Adolescent Psychology* 45, 64 (Richard M. Lerner & Laurence Steinberg eds., 2004) (cognitive functions exhibited robust growth at earlier ages and began to approach the limits of growth in the 14- to 16-year-old group); Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 23, at 8-9 & fig. 2 (study showed almost linear increase in cognitive abilities from age 10-11 until age 16-17, when cognitive abilities began to plateau).

nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment.[26] Younger adolescents are even less capable of mature judgment, since they may be lacking not only those social and emotional skills but basic cognitive capabilities as well.

2. Juveniles are more vulnerable to negative external influences

As *Simmons* also recognized, "juveniles are more vulnerable ... to negative influences and outside pressures, including peer pressure." 543 U.S. at 569. Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment—and, indeed, their actions are shaped directly by family and peers in ways that adults' are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control."[27] Both the family and the neighborhood in which an adolescent finds himself play a major role in juvenile delinquency.[28] Yet, precisely because of their

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[26] Cauffman & Steinberg, *supra* note 10, at 743-745; *see also* Halpern-Felsher & Cauffman, *supra* note 13, at 264-271; Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55-59 (2008).

[27] Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths, in Youth on Trial* 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[28] *Id.* at 47-48; Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events, in Youth on Trial* 371-394 (Thomas Grisso & Robert G. Schwartz eds., 2000).

legal minority, juveniles lack the freedom and autonomy to remove themselves from external influences that may exert pressure toward crime. Put simply, juveniles lack the control over themselves and over their lives that adults possess.

Juveniles not only lack control over their environment generally but are also less capable than adults of withstanding the negative influence of peer pressure—which is difficult for older juveniles to resist and even more difficult for younger juveniles to resist. Research has shown that susceptibility to peer influence, particularly in situations involving pressure to engage in antisocial behavior, increases between childhood and early adolescence, peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18.[29] One recent experimental study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among young adults.[30] "[T]he presence of peers makes adolescents

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[29] Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 612, 615-616 (1979); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 848 (1986); Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008); *see also* Kristan Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. Youth & Adolescence 395, 420-421 (2000) (discussing peer influence on delinquency); Fagan, *supra* note 28, at 382-384 (discussing coercive effect of social context on adolescents).

[30] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in*

and youth, but not adults, more likely to take risks and more likely to make risky decisions."[31]

Juveniles' lesser ability to resist peer influence affects their judgment and behavior both directly and indirectly, leading juveniles to take risks that adults might not. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, affect their choices even without direct coercion. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations."[32]

Adolescents are thus more likely than adults to alter their behavior in response to peer pressure—such as by engaging in antisocial behavior to conform to peer expectations or to achieve respect and status among their peers.[33] Juvenile crime is significantly correlated with exposure to delinquent peers.[34] Not surprisingly,

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Adolescence and Adulthood: An Experimental Study, 41 Developmental Psychol. 625, 626-634 (2005); *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531, 1531 (2007) (describing Gardner and Steinberg study).

[31] Gardner & Steinberg, *supra* note 30, at 634.

[32] Scott & Steinberg, *supra* note 29, at 38-39; *see also* Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 686; Zimring, *supra* note 12, at 280-281.

[33] *See, e.g.*, Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 686.

[34] *See id.* at 687-688.

therefore, adolescents are much more likely than adults to commit crimes in groups.[35] "No matter the crime, if a teenager is the offender, he is usually not committing the offense alone."[36] Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive."[37] "A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer-pressure," a social skill that is not fully developed in adolescents.[38]

In short, as this Court has observed, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). Because juveniles' developmental immaturity and legal minority render them both more susceptible to, and less capable of escaping, negative external pressures, they "have a greater claim than adults to be forgiven" for the criminal acts that are the result of such pressures. *Simmons*, 543 U.S. at 570.

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[35] Scott & Steinberg, *supra* note 29, at 39; *see also* Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 63 (1999) (in 1997, juveniles were twice as likely as adults to commit serious violent crimes in groups).

[36] Zimring, *supra* note 12, at 281; *see also* Joan McCord & Kevin P. Conway, *Co-Offending and Patterns of Juvenile Crime* 9 (Dec. 2005) (finding that group offenses outnumbered solo offenses by almost 2 to 1 for those under 13, by 1.5 to 1 for 13- to 15-year-olds, and by 1.2 to 1 for 16- to 17-year-olds).

[37] Zimring, *supra* note 12, at 280.

[38] *Id.* at 280-281.

3. Juveniles' unformed identity makes it less likely that their offenses evince a fixed bad character and more likely that they will reform

Finally, as *Simmons* recognized, juveniles differ from adults—and juvenile crime and culpability differ from adults'—because "the character of a juvenile is not as well formed as that of an adult," and "[t]he personality traits of juveniles are more transitory, less fixed." 543 U.S. at 570. Indeed, the defining quality of adolescence is that character is not yet fully formed. Adolescents are still in the process of forging an identity, a process that will not be complete at least until early adulthood.[39]

Given juveniles' relatively unformed identity, their transgressions do not necessarily indicate an entrenched "bad" character requiring permanent incapacitation. Instead, their actions often reflect the immaturity, impulsivity, and vulnerability that are the "signature qualities of youth" itself. *Simmons*, 543 U.S. at 570 (internal quotation marks omitted). And these characteristics of adolescence are transient. As this Court has recognized, for that reason, it is more

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[39] *See, e.g.*, Alan S. Waterman, *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341, 355 (1982) ("The most extensive advances in identity formation occur during the time spent in college."); Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[M]ost identity development takes place during the late teens and early twenties."); Scott & Steinberg, *supra* note 29, at 52 (coherent integration of identity does not occur until late adolescence or early adulthood; the final stages of this process often occur in the college years).

likely that juveniles' "character deficiencies will be reformed" as the "impetuousness and recklessness" of youth subside in adulthood. *Id.* (internal quotation marks omitted). In other words, it is "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Indeed, youth mitigates culpability precisely because its "signature qualities" are transient: a youthful offender is not yet the person he will become in adulthood. *Simmons*, 543 U.S. at 570. Adolescent criminal conduct typically results from normative experimentation with risky behavior and not from deep-seated moral deficiency reflective of "bad" character.[40] For most juveniles, therefore, antisocial behavior is fleeting and will "'cease with maturity as individual identity becomes settled.'" *Simmons*, 543 U.S. at 570 (quoting Steinberg & Scott, *supra* note 13, at 1014). Only a small proportion of adolescents who experiment with illegal activities will develop an entrenched pattern of criminal behavior that persists into adulthood.[41] "[T]he vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature."[42]

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[40] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 686, 690; Steinberg & Scott, *supra* note 13, at 1015; *see also* Arnett, *supra* note 4, at 344, 366-367.

[41] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 685-686; Steinberg & Scott, *supra* note 13, at 1014.

[42] Steinberg & Scott, *supra* note 13, at 1015; *see also* Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 685-686.

Moreover, juveniles' unformed selves mean that their future character and conduct cannot be reliably or accurately predicted. Researchers have consistently concluded that behavior can be identical in adolescents who will continue as criminal offenders through adulthood and those who will not.[43] When confronted with a delinquent adolescent, it is very difficult to predict accurately whether that individual will persist in criminal behavior or will desist from crime in adulthood, as the vast majority of delinquent adolescents do.

Indeed, as this Court concluded in *Simmons*, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 543 U.S. at 573. For similar reasons, as the Court noted, psychiatrists generally will not diagnose antisocial personality disorder—also known as psychopathy or sociopathy—before the age of 18. *Id.* (citing American Psychiatric Association, *Diagnostic and Sta-*

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[43] Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) ("Assessing adolescents ... presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers."); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2005) (discontinuity of disorders in adolescence creates "moving targets" for identification of mental disorders); John F. Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53, 59 (2001) (citing studies and noting difficulty of predicting juveniles' future behavior, such as antisocial conduct or psychopathy, because juveniles' social and emotional abilities are not fully developed).

tistical Manual of Mental Disorders 701-706 (4th ed. rev. 2000)).[44]

In sum, juveniles are still developing their character and identity, and it is likely that a juvenile offender will desist from crime in adulthood. *Simmons*, 543 U.S. at 570. Because juvenile crime is likely to be the product of the "signature qualities of youth," *id.*, there is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character, and no reliable way to conclude that a person deserves to die in prison—without any opportunity to demonstrate change or reform—for an offense committed as a juvenile.

B. Juveniles' Psychosocial Immaturity Is Consistent With Emerging Research Regarding Brain Development

Emerging research shows that the brain is still developing during adolescence in ways consistent with adolescents' demonstrated psychosocial immaturity. Specifically, adolescent brains are not yet fully devel-

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[44] The difficulty in predicting an adolescent's future character and conduct is particularly acute in attempting to identify individuals with psychopathy. Although some emerging research has suggested that some psychopathic traits might be more stable over time than previously thought, even these studies demonstrate that the predictive power of juvenile psychopathy assessments is quite weak. For example, one study found that if diagnostic scores on a measure of juvenile psychopathy were used to predict adult psychopathy, the prediction that juveniles who scored in the top 20 percent of psychopathic traits at age 13 would be psychopathic at age 24 would be wrong in 86 percent of cases. Donald R. Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155, 160, 162 (2007).

oped in regions related to risk evaluation, emotional regulation, and impulse control. "[O]ur emerging understanding of adolescent brain maturation ... suggests that brain systems responsible for logical reasoning and basic information processing mature earlier than those that undergird more advanced executive functions and the coordination of affect and cognition necessary for psychosocial maturity."[45] As discussed above, mature judgment requires both cognitive and psychosocial skills—as well as the ability to coordinate the two. Recent neurobiological research suggests that the brain systems that govern many aspects of social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition, continue to mature throughout adolescence.[46]

Advances in magnetic resonance imaging (MRI) have contributed to scientists' greater understanding of

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[45] Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 23, at 10; *see also* Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 Neuropsychologia 1270, 1270-1271 (2007) (prefrontal brain areas associated with higher-order cognition and emotional regulation are some of the last to mature; this lag in maturation in areas associated with reward values and control of behavior may explain why adolescents demonstrate poor decision-making); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Rev. 78, 93 (2008).

[46] *See, e.g.*, Eshel et al., *supra* note 45, at 1270-1271; Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 Law & Hum. Behav. 78, 79-80 (2008); Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity*, *supra* note 11, at 1765.

adolescent brain development. Research using MRI technology (available only since the 1990s) has allowed scientists to examine brain activity while an individual performs tasks involving speech, perception, reasoning, and decision-making. In addition, scientists have been able to study developmental changes in the structure of the brain during childhood and adolescence, by examining the same individuals over time at periodic intervals.[47]

The frontal lobes—and in particular the prefrontal cortex—of the brain play an essential part in higher-order cognitive functions. These regions of the brain are central to the process of planning and decision-making, including the evaluation of future consequences and the weighing of risk and reward.[48] They

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[47] *See, e.g.*, Kenneth K. Kwong et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proc. Nat'l Acad. Sci. 5675, 5676-5678 (1992) (describing MRI mapping of brain activity); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861, 861 (1999) (describing study of 145 children and adolescents scanned up to five times over approximately ten years); Tomáš Paus, *Brain Development, in Handbook of Adolescent Psychology* 95, 97-98 (Richard M. Lerner & Laurence Steinberg eds., 2009); Linda Spear, *The Behavioral Neuroscience of Adolescence* 108-111 (forthcoming 2009).

[48] Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189, 2198-2200 (2000) (patients with lesions in the prefrontal cortex suffered from impairments in the ability to make real-life decisions because of an insensitivity to future consequences, whether reward or punishment); Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. Neurosci. 428, 428, 434 (1998) (prefrontal cortex is necessary for decision-making in tasks involv-

are also essential to the ability to control emotions and inhibit impulses.[49] In short, fully developed and properly functioning frontal lobes play a critical role in a person's capacity to be a rational moral actor, capable of mature decision-making.

Yet, as MRI studies have shown, the prefrontal cortex is one of the last regions of the brain to mature.[50] During childhood and adolescence, the brain is maturing in at least two major ways relevant here. First, the brain undergoes myelination, the process through which the neural pathways connecting different parts of the brain become insulated with white fatty tissue called myelin.[51] That insulation "speeds ... neural signal transmission," making "communication between dif-

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ing evaluation of risk and reward); Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in Clinical Neuropsychology* 404, 434 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003) (one "hallmark of frontal lobe dysfunction is difficulty making decisions that are in the long-term best interests" of the individual); *see also* Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999) (frontal lobes are essential for planning and organization).

[49] *See, e.g.*, Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23, 24, 141 (2001); *see also* B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Biological Psychol. 241, 244-246 (2000).

[50] Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); Casey et al., *supra* note 49, at 243; Spear, *supra* note 47, at 87-88.

[51] *See, e.g.*, Goldberg, *supra* note 49, at 144.

ferent parts of the brain faster and more reliable."[52] Myelination improves both neural connections within the prefrontal cortex itself and the neural connections between the prefrontal cortex and subcortical regions that are important for the processing of emotions and social information.[53]

Second, during childhood and adolescence, the brain is undergoing "pruning"—the paring away of unused synapses, leading to more efficient neural connections.[54] During adolescence, synaptic pruning is more characteristic of the prefrontal cortex than other brain regions, consistent with the observation that adolescence is a time of marked improvement in executive functions.[55]

Through myelination and pruning, the brain's frontal lobes change, with "white matter"—the tissue that

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[52] *Id.*

[53] *See, e.g.*, Casey et al., *supra* note 49, at 245-246; Allan L. Reiss et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 Brain 1763, 1770 (1996); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8828 (2001); Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, *supra* note 45, at 93-99.

[54] Casey et al., *supra* note 49, at 242-243; Gogtay et al., *supra* note 50, at 8175; Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction*, *supra* note 53, at 8828; Spear, *supra* note 47, at 81-90; Peter R. Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* 41, 46-47, 52-58, 67 (2002).

[55] Eshel et al., *supra* note 45, at 1270-1271; Spear, *supra* note 47, at 87-90.

forms pathways among different parts of the brain—increasing, and "gray matter"—the neurons that are the building blocks of the brain—decreasing.[56] These changes in the brain's composition are thought to help the brain work faster and more efficiently, improving the "executive" functions of the frontal lobes, including impulse control and risk evaluation.[57] This shift in the brain's composition continues throughout adolescence; indeed, studies indicate that myelination continues into young adulthood.[58]

Although the precise underlying mechanisms of brain development continue to be studied, it is clear that, in late adolescence, important aspects of brain maturation remain incomplete, particularly those involving the brain's executive functions and the coordinated activity of regions involved in emotion and cognition.[59] In short, the part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence, consistent with the demonstrated behavioral and psychosocial immaturity of juveniles.

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[56] *See, e.g.*, Casey et al., *supra* note 49, at 243; Goldberg, *supra* note 49, at 27.

[57] *See, e.g.*, Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction*, *supra* note 53, at 8828; Casey et al., *supra* note 49, at 245-246; Reiss et al., *supra* note 53, at 1770.

[58] Huttenlocher, *supra* note 54, at 62; *see also* Giedd et al., *supra* note 47, at 861, 862 (longitudinal MRI study documenting an increase in white matter until age 22); Reiss et al., *supra* note 53, at 1770 (observing increase in white matter in prefrontal region of the brain throughout adolescence and into young adulthood).

[59] *See, e.g.*, Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, *supra* note 45, at 93-99.

II. Sentencing The Juvenile Offenders In These Cases To Die In Prison With No Opportunity to Demonstrate Reform Is A Disproportionate Punishment

As this Court recognized in *Simmons*, juveniles' immaturity, vulnerability, and changeability—while they in no way excuse juveniles' crimes—substantially lessen their culpability and undermine any justification for definitively ending their free lives. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" 543 U.S. at 570 (quoting *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988)). "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* And "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* For those reasons, "the death penalty is a disproportionate punishment for offenders under 18." *Id.* at 575. Those same mitigating characteristics support the conclusion that condemning a juvenile to die in prison for the offenses at issue here is a constitutionally disproportionate punishment.

This Court has held that, in light of death's finality and irreversibility, capital punishment warrants especially close scrutiny, and necessitates procedural protections not otherwise required, in order to ensure that its imposition complies with the Eighth Amendment's dictates. *See, e.g.*, *Harmelin* v. *Michigan*, 501 U.S. 957, 1006 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Eddings*, 455 U.S. at 110;

Lockett v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). Yet it has consistently held that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences," *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment), and that the Eighth Amendment forbids any punishment that is "grossly disproportionate" to the crime, *id.* at 1001 (internal quotation marks omitted).

The Court has recognized that, under certain circumstances, the punishment of life in prison without parole may be grossly disproportionate in light of the gravity of the offense and the blameworthiness of the offender. *See Solem* v. *Helm*, 463 U.S. 277, 290-294 (1983). In particular, the *Solem* Court explained that it was appropriate to examine not merely the nature of the crime, but also the "culpability of the offender," including the offender's level of participation in the crime and his intent or motive in committing it. *Id.* at 293. The Court concluded that a sentence of life without parole was an unconstitutionally disproportionate punishment for a seventh non-violent felony committed by an adult offender. *See id.* at 303.

The Court has subsequently rejected Eighth Amendment challenges to a sentence of life without parole for possession by an adult of a large quantity of cocaine, *see Harmelin*, 501 U.S. at 994-996, and to lengthy sentences of terms of years with the possibility of eventual parole imposed on adults for repeated felony offenses that included serious or violent felonies, *see Lockyer* v. *Andrade*, 538 U.S. 63 (2003); *Ewing* v. *California*, 538 U.S. 11, 29-31 (2003) (plurality opinion). But it has reaffirmed *Solem*'s basic holding that the imposition of a sentence of imprisonment is constrained by a requirement of proportionality to the offense and the offender. *See Harmelin*, 501 U.S. at 997-998, 1001

(Kennedy, J., concurring in part and in the judgment); *Lockyer*, 538 U.S. at 72, 74; *Ewing*, 538 U.S. at 22-24. This Court has never yet had occasion to examine the constitutionality of the rare sentence at issue here: a sentence of life without the possibility of parole imposed on a juvenile for a non-homicide crime. But the principles articulated in this Court's Eighth Amendment jurisprudence support the conclusion that such a sentence is grossly disproportionate.

As an initial matter, while a sentence of death unquestionably differs from a sentence of imprisonment, imprisonment for life without the possibility of parole, like death, is in a very real sense final and irrevocable. It condemns the offender to live out his entire life and die in prison, precluding release regardless of anything he may do to redeem himself or demonstrate a changed character. Such a sentence is particularly harsh when imposed on a juvenile, who will spend his entire life in prison as a result of a crime committed as a minor, without ever experiencing adulthood—or the ability "to attain a mature understanding of his own humanity," *Simmons*, 543 U.S. at 574—as a free person.

The same characteristics of juveniles that this Court has already recognized mitigate their culpability and render a sentence of death an unconstitutionally disproportionate response to their offenses are relevant to the constitutionality of a sentence of life without parole. As discussed above, even older juveniles are significantly less capable than adults of mature, considered judgment. And the susceptibility of even late adolescents "to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835). Younger juveniles are still less able to make mature decisions, as

their basic cognitive capacities may not yet be fully developed—a particularly compelling factor mitigating culpability. *See Atkins* v. *Virginia*, 536 U.S. 304, 318 (2002). In short, because juveniles "have less capacity [than adults] to control their conduct and to think in long-range terms," juveniles "deserve less punishment" for their crimes. *Eddings*, 455 U.S. at 115 n.11 (internal quotation marks omitted).

Similarly, juveniles' vulnerability to negative influences that may be beyond their control "mean[s] juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Simmons*, 543 U.S. at 570. Because of their developmental immaturity, adolescents are more susceptible to the influence of the family and environment that produced them. Yet, because of their legal minority, juveniles "'lack the freedom that adults have to extricate themselves from a criminogenic setting.'" *Id.* at 569 (quoting Steinberg & Scott, *supra* note 13, at 1014). Juveniles' susceptibility to peer pressure also leads them to make unwise choices they would not be likely to make as adults and leads directly or indirectly to a significant proportion of juvenile crime. Because a key element of culpability is the notion that the criminal actor, exercising self-determination, made a choice to offend, juveniles' greater vulnerability to their environment and peers further mitigates their culpability. *Cf. Morissette* v. *United States*, 342 U.S. 246, 250 (1952) (culpability based on intentional conduct is rooted in our belief in the "freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

Finally, the transitory nature of adolescence itself, and the fact that juveniles' character is still being formed, means that juveniles' criminal conduct cannot

be morally equated with that of adults: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Simmons*, 543 U.S. at 570.

The penological justifications for a sentence of life imprisonment without parole—like a sentence of death—are thus significantly weaker when applied to juveniles. The retributive purpose of such a punishment has substantially less force when applied to those "whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Simmons*, 543 U.S. at 571. Likewise, the same characteristics of juveniles that render them less culpable—their impulsivity, rash decision-making, biased attention to the anticipated immediate rewards of a choice rather than its potential longer-term costs, and lesser ability to consider and evaluate the future consequences of their actions—substantially weaken the deterrence justification for such punishment. *Id.*[60] And

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[60] Indeed, empirical studies evaluating the deterrent effect of laws mandating that juvenile offenders be transferred to the adult criminal justice system for certain crimes have concluded that the threat of adult criminal sanctions had no measurable effect on juvenile crime. Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effect of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 526-531 (1988) (comparing juvenile arrest statistics for four years prior to enactment of New York's transfer legislation with juvenile arrest statistics in the six-year period after enactment and finding little measurable impact on serious juvenile crime); Eric L. Jensen & Linda K. Metsger, *A*

while life without parole will unquestionably incapacitate a juvenile offender, life imprisonment with the possibility of parole would also serve that function, while allowing for the significant possibility that a juvenile will change and develop a moral character as an adult.

By contrast, condemning an offender to die in prison for a crime committed as a juvenile forecloses that possibility. As discussed above, and as *Simmons* recognized, adolescence is transitory, and adolescents change. Indeed, most adolescents who commit crimes will desist from criminal activity in adulthood. Because the adolescent self is not yet fully formed, there is no way reliably to conclude that an adolescent's crime is the expression of an entrenched and irredeemably malign character that might justify permanent incarceration, and no way to distinguish the hypothetical juvenile offender who is a hardened criminal from the offender whose crime is a product of the transient influences of adolescence itself. Sentencing a juvenile to die in prison, without any possibility of release, thus cannot rest on the conclusion that he is incapable of change or redemption. That simply cannot be said with any confidence of juveniles.

For all these reasons, sentencing an immature and less culpable juvenile to die in prison, particularly for the non-homicide offenses at issue here, is a grossly disproportionate punishment.

Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime, 40 Crime & Delinq. 96, 100-102 (1994) (comparing juvenile arrest statistics for the five-year periods before and after enactment of Idaho's transfer legislation and finding no deterrent effect on violent juvenile crime).

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF FOR AMNESTY INTERNATIONAL, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. INTERNATIONAL LAW AND OPINION FORM A BASIS OF LAW AND GOVERNMENT IN THE UNITED STATES 4

II. INTERNATIONAL LAW PROHIBITING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS INSTRUCTIVE TO THE COURT'S EIGHTH AMENDMENT ANALYSIS 9

A. The Prohibition Of Juvenile Life Without Parole Sentences Is *Jus Cogens* 10

1. The Prohibition is General or Customary International Law 13

2. There is Universal Acceptance that the Prohibition is Non-Derogable and Applies to All States 17

3. There is No Other Peremptory Norm Modifying the Prohibition of Juvenile Life Without Parole Sentences 23

B. The United States has been Found Out of Compliance with its Treaty Obligations in Allowing Life Without Parole Sentences 24

C. The Uniformity and Consistency of International Law and Practice Should Inform the Court's Eighth Amendment Analysis..... 30

III. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS..... 32

A. Historically, Juvenile Offenders Were Treated with More Leniency Than Adults in the United Kingdom 33

B. Sentencing Juveniles to Life Imprisonment without Parole is Prohibited by Law..... 36

IV. CONCLUSION..... 38

APPENDIX..... 1

TABLE OF AUTHORITIES

Page

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 8

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433 U.S. 584 ..... 7, 8, 30

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978 F.2d 493 (9th Cir. 1992) 31

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25 F.3d 1467 (9th Cir. 1994) 31

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428 U.S. 153 (1976) 4

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539 U.S. 306 (2003) 4, 7

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539 U.S. 558 (2003) 6, 32

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(Statutes)

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§ 28 37

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AMICUS BRIEF ON BEHALF OF APPELLANTS GRAHAM AND SULLIVAN

STATEMENT OF INTEREST

Amnesty International, Amsterdam Bar Association, Bar Council of Hong Kong, Bar Human Rights Committee of England and Wales, Bar of Montreal, Center for Constitutional Rights, Columbia Law School Human Rights Clinic, Human Rights Advocates, Law Council of Australia, Law Society of England and Wales, Law Society of Ireland, Netherlands Bar Association, New Zealand Law Society, The Advocates for Human Rights, and Union Internationale des Avocats hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Petitioners.[1] The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law and opinion when applying the Eighth Amendment's clause prohibiting cruel and unusual punishments. International standards for sentencing juvenile offenders to life in prison without the possibility of parole bears directly on domestic compliance with international legal and societal norms. Those standards also provide an

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[1] Counsel of record received timely notice of the intent to file this brief. Letters from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

important indicator of evolving standards of decency, which in turn illuminate the contours of acceptable conduct under the Eighth Amendment. The United States is the only country in the world that does not comply with the norm against imposing life without parole sentences on juveniles under the age of 18. Prohibiting the sentence challenged in these cases would bring the United States into compliance with one of the most widely accepted human rights norms and with its international treaty obligations, and it would honor the Eighth Amendment principles that led this Court to strike down the juvenile death penalty in *Roper v. Simmons*, 543 U.S. 551 (2005).

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States from the Declaration of Independence forward. The Founders were greatly influenced by international legal and social thought; and throughout the history of this country, courts have referred to international standards in considering the permissibility of practices under the Constitution. This is particularly true with respect to the Eighth Amendment's "cruel and unusual punishments" clause. Thus, *amici* consider the history of treatment of juveniles under international law and practice with respect to life without parole sentences to be of particular interest to this Court in carrying out its role under U.S. constitutional law.

Every other country in the world has rejected the practice of giving this sentence to offenders who

were under 18 at the time they committed a crime. Although a few countries technically permit the sentence, no known persons are actually serving the sentence outside the United States. In order to comply with international law, the few countries in which juveniles reportedly received such sentences either have changed their laws or given assurances that the juvenile offenders can apply for parole. The universal prohibition against such a sentence outside of the United States reflects not just customary international law, but a peremptory, non-derogable, *jus cogens* norm of international law. In addition, because of the historical relationship between the United Kingdom and the United States, the experience of England and Wales in prohibiting juvenile life without parole sentences can provide particular guidance to this Court.

Indeed, this Court referred to the international law regarding the juvenile death penalty in holding that sentence unconstitutional under the Eighth Amendment. *Roper*, 543 U.S. at 575-79. Many of the international standards referred to in *Roper* condemn equally the death penalty and life without parole sentences when applied to juveniles. Just as those standards supported the constitutional prohibition of the juvenile death penalty, so too they support the reversal of Mr. Graham and Mr. Sullivan's sentences.[2]

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[2] At a minimum, since juvenile life without parole is considered similar to the juvenile death penalty under

ARGUMENT

I. INTERNATIONAL LAW AND OPINION FORM A BASIS OF LAW AND GOVERNMENT IN THE UNITED STATES

From the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community. Indeed, the Declaration of Independence speaks to the relevance of other nations:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence, para. 1 (U.S. 1776) (emphasis added). This Court has affirmed that history and noted that:

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international law, this Court should carefully consider the imposition of such a serious sentence without the protections enunciated by this Court in the context of the application of the death penalty, as occurred in the case of Mr. Graham. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-730 (2004).

In urging courts to afford the "decent respect to the opinions of mankind" intended by the Founders, Justice Blackmun has explained that:

> [T]he early architects of our Nation understood that the customs of nations – the global opinion of mankind – would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, the principal drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. Accordingly, the Declaration of Independence

reflects a broad understanding of eighteenth century political thought, and was greatly influenced by French, English, and Scottish Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic.

Similarly, John Adams was sensitive to, and familiar with, international opinion as it related to the Nation's laws and institutions. During his time as Minister to Great Britain, Adams wrote a multi-volume defense of the new Constitution and its form of government. In it he demonstrates his deep knowledge of various forms of governments and the necessity of selecting the best the world had to offer to create a better government. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America,* Preface, Grosvenor Square (Jan. 1, 1797), http://www.constitution.org/jadams/ja1_00.htm.

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the evolution of societal norms and to the scope and content of Constitutional rights—irrespective of the precise legal status of the norms at issue. In *Roper*, which abolished juvenile executions, the Court considered not only the evolution of international law, but also the evolution of the practice in the community of nations of referring to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* at 575-78; *see also, e.g., Lawrence v. Texas*, 539

U.S. 558, 576-77 (2003) (holding Texas's law prohibiting sodomy unconstitutional when other nations "have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct," a right which "has been accepted as an integral part of human freedom in many other countries"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J., concurring) (referencing provisions in International Convention on the Elimination of All Forms of Racial Discrimination as basis for holding law school's affirmative action program did not violate Equal Protection Clause); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (reversing death penalty for felony murder conviction, referencing that practice was unknown, abolished or severely restricted in other countries); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (taking into account "the climate of international opinion concerning the acceptability of a particular punishment," noting it was "not irrelevant here that out of 60 major nations in the word . . . only 3 retained the death penalty for rape where death did not ensue").

The very constitutional provision at issue in this case—the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted"—traces its origin directly to the laws of another nation. The foundation for the phrase "cruel and unusual" stems from the "Anglo-American tradition of criminal justice." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The phrase was taken directly from the English Declaration of Rights of 1688, and the principle came from the Magna Carta. *Id.* For this reason,

the Amendment's meaning must be drawn from the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

This Court has a proud history of looking to the standards of the international community, in particular in determining the contours of the Eighth Amendment's cruel and unusual punishments clause. *See, e.g., Roper,* 543 U.S., at 575-78 (noting that international law and the laws of other countries, including the United Kingdom, prohibit the juvenile death penalty); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of death penalty for persons with mental retardation); *Trop*, 356 U.S. at 102 (noting "virtual unanimity" within international community that denationalization constitutes cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (considering abolition of juvenile death penalty by leading nations in Western Europe and among countries sharing our Anglo-American heritage), *recognized in Roper,* 543 U.S. at 575; *see also Coker,* 433 U.S. at 596 (60 countries surveyed where only 3 retained death penalty for rape in non-homicide cases). To view the evolving standards of decency in an isolated and insular domestic environment would be contrary to all that the Founders considered essential to joining the ranks of nations.[3]

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[3] International law also informs state and local jurisprudence in the United States. *See* Human Rights in State Courts, Opportunity Agenda, at 10-38,

The Founders sought to elicit the very best from themselves, fellow citizens and all of humankind in creating the United States. They were not as concerned with the source of a just principle as they were with its value to a just and honorable country. Similarly, this Court should consider international standards and recognize that sentencing juvenile offenders to die in prison does not have a place in an evolved society. Surely children in the United States are not worse, less human, or less deserving than children in the rest of the world.

II. INTERNATIONAL LAW PROHIBITING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS INSTRUCTIVE TO THE COURT'S EIGHTH AMENDMENT ANALYSIS

The practice of sentencing juvenile offenders to life imprisonment without the possibility of parole has been rejected by every nation in the world except the United States. Only the United States still imposes the sentence. Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison,* 42 U.S.F. L. Rev. 983, 989-1007 (2008) (hereinafter "*Sentencing our Children to Die*"). Indeed, the prohibition against the sentence of life without parole for juveniles is part of customary international law, and the elevation of this norm to the status of *jus cogens* by the

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http://opportunityagenda.org/category/tags/human-rights (listing 35 states in which international human rights law considered persuasive in state court decisions).

worldwide condemnation of this practice and the expectation for all nations to comply, should provide guidance to this Court in interpreting the Constitution.[4] Moreover, the consistency and uniformity of international law and opinion against the challenged sentence should weigh heavily in this Court's determination that the juvenile life sentence without parole is inconsistent with the Eighth Amendment's prohibition of cruel and unusual punishments.

A. The Prohibition Of Juvenile Life Without Parole Sentences Is *Jus Cogens*

Under article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm of international law is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, (May 23, 1969) (hereinafter "Vienna Convention").[5] The Restatement (Third) of the

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[4] As discussed below, imposition of this sentence by courts in Florida and elsewhere in the country renders the United States out of compliance with its international treaty obligations.

[5] Although the United States has not ratified the Vienna Convention, it nonetheless accepts the treaty's principles as binding law—i.e., part of United States law. *See, e.g.*, Restatement § 102; Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?* 32 U.S.F. L. Rev. 735, 754,

Foreign Relations Law of the United States, which explicates the content and status of international law *as United States law,* agrees with this standard. Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. k (hereinafter "Restatement").

The doctrine of *jus cogens* focuses on the supremacy of certain international law norms in regulating state practice. Ian Brownlie, Principles of Public International Law 512–13 (Oxford 1990) (hereinafter "Brownlie"); *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 4, at paras. 33–34 (Feb. 5). These are rules originally derived from treaties and/or state practice, comprising customary international law (which the Restatement describes as resulting "from a general and consistent practice of states followed by them from a sense of legal obligation" Restatement §102(2)). However, unlike general customary law, *jus cogens*, also called peremptory norms, have attained a higher status in international law such that the global community of nations expects all states to comply, and none to derogate, regardless of consent, express or implied.

According to the Restatement, *jus cogens* "rules prevail over and invalidate international agreements and other rules of international law in conflict with them." *Id.*, cmt. k. The Ninth Circuit has explained that:

759-62 (1998) (explaining that United States is bound by *jus cogens*).

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, see Restatement § 102 Comment d, just as a state that is not party to an international agreement is not bound by the terms of that agreement .... In contrast, *jus cogens* "embraces customary laws considered binding on all nations" and "is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations," [citations omitted].

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (recognizing torture as *jus cogens* violation).

While commentators may disagree on the exact scope of all *jus cogens* norms, there is agreement about their existence as an established part of international law. *Id.*; *see also Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244-45 (2d Cir. 1996) (discussing *jus cogens* norms as they relate to states' sovereign immunity); *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th

Cir. 2004) (discussing *jus cogens* norms—"a special type of customary international law"—with regard to head of state immunity). Courts have also recognized that *jus cogens* norms may inform U.S. jurisprudence. *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940-41 (D.C. Cir. 1988) (dicta) ("[basic norms of international law] may well restrain our government in the same way that the Constitution restrains it"). The norm is said to be established where there is acceptance and recognition by a "large majority" of states, even if over dissent by a very small number of states. Restatement §102 & rptr. n. 6 (citing Report of the Proceedings of the Committee of the Whole, at 471-72, U.N. Doc.A/Conf. 39/11 (1968)).

A *jus cogens* norm must fulfill three basic requirements: 1) it is general or customary international law; 2) it is accepted by a large majority of states as non-derogable; and 3) it has not been modified by a new norm of the same status. As discussed below, the prohibition against life without parole sentences for offenders under the age of 18 when they committed their crime satisfies these requirements. Thus, the prohibition is *jus cogens,* and the community of nations expects the United States to comply.

1. The Prohibition is General or Customary International Law

General or customary international law requires widespread, constant, and uniform state practice compelled by a sense of legal obligation over a sufficiently long time period,

notwithstanding a few uncertainties or contradictions in practice during this time. *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 138–39 (Dec. 10) (discussing general international law applicable to delimitation of Norwegian fisheries zone); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, at 98, para. 186 (June 27) (to deduce existence of customary rules, it is "sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule").

Furthermore, "a very widespread and representative participation in [a] convention might suffice of itself" to evidence the attainment of customary international law, provided it included participation from "States whose interests were specially affected." *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, paras. 73–74 (Feb. 20) ("although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general

recognition that a rule of law or legal obligation is involved"). This definition is accepted by most legal scholars in and outside the United States. *See, e.g.*, Restatement § 102; Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context 74-78 (Oxford 2008).

The prohibition against sentencing child offenders to life without parole meets these criteria. It is a treaty rule and customary practice, followed by all countries as a legal obligation, except the United States.[6] As this Court noted in *Roper*, there is near-universal ratification of the U.N. Convention on the Rights of the Child ("CRC") which, in article 37, expressly prohibits the sentence for juveniles along with the death penalty. This is because imposing such sentences on juvenile offenders contravenes society's notion of fairness and the shared legal responsibility to protect and promote child development. The Committee on the Rights of the Child, the treaty body that monitors compliance with the CRC, has noted that customary international law recognizes that the special characteristics of children should be considered when imposing sentences in the criminal justice system. Committee on the Rights

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[6] The United States and Somalia are the only two countries not party to the CRC. *See* OHCHR, Status of the Principal International Human Rights Treaties, *at* http://www.unhchr.ch/pdf/report.pdf. Lacking a functioning government, Somalia could not feasibly have ratified the CRC, *see, e.g.*, U.S. Department of State report on Somalia, http://www.state.gov/r/pa/ei/bgn/2863.htm, leaving the United States as the only country that could have but has not ratified the treaty.

of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, paras. 10-11, U.N. Doc CRC/C/GC/10 (2007). Indeed, the LWOP sentence penalizes child offenders more than adults because the child, by virtue of young age, will likely serve a longer sentence than an adult for the same crime.

Moreover, all functioning states besides the United States comply with the legal obligation, including those whose interests are specially affected. Other states that had used the sentence have abolished it. *Sentencing our Children to Die, supra*, at 989. The United States is now responsible for 100% of all child offenders serving this sentence.

While the CRC entered into force in 1992, very few countries have *ever* imposed life sentences on child offenders. *Sentencing our Children to Die, supra*, at 989-1007. For example, in Germany, the maximum sentence for youth under 18 for any crime is 10 years (Arts. 5, 17 & 18 of the Jugendgerichtsgesetz (JGG), Juvenile Justice Act, German penal code of 1923, consolidated version of 12/17/2008, www.gesetze-im-internet.de/bundesrecht/jgg/gesamt.pdf); in Italy it is 24 years (Arts. 23, 65 & 98 of the penal code, *codice penale*, http://dbase.ipzs.it/cgi-free/db2www/notai/arti.mac/input?swpag=12E); and in France it is 16 to 20 years for juveniles under age 16 (Arts. 2 & 20-2, Ordonnance of 2 Feb. 1945, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069158&dateTexte=20090701).

Most governments either have expressly prohibited, never allowed, or do not impose such sentences on child offenders, because it violates the principles of child development and protection established through national standards and international human rights law. *Sentencing our Children to Die, supra*, at 989-90. Of the remaining countries besides the United States that have laws that could permit the sentencing of child offenders to life without parole, in ten (Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka) there are no known cases where the sentence has been imposed. *Id.* at 990. Even in the United States, the sentence was not used on a large scale until the 1990s when crime reached record levels. *See* P. Griffin, et al., Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions, National Center for Juvenile Justice (1998), www.ncjrs.org/pdffiles/172836.pdf. Before 1992, the sentence had rarely been imposed. Jonathan E. Cruz, *Juvenile Waivers and the Effects of Proposition 21*, 1 Law & Soc'y Rev. 29, 38 (2002). Thus, the norm prohibiting the juvenile life without parole sentence is widespread, constant and uniform—and it predates formal codification in the CRC.

2. There is Universal Acceptance that the Prohibition is Non-Derogable and Applies to All States

Whether a rule of international law has achieved peremptory status depends on whether

nations agree that the rule is legally binding on *all* states. *See* Dinah Shelton, *Normative Hierarchy in International Law*, 100 Am. J. Int'l L. 291, 323 (2006); Brownlie, *supra*, at 512–13. It is therefore important to evaluate the legal expectations of the community of nations and their practice in conformity with those expectations. Treaties and UN resolutions can provide evidence of such expectations. Rosalyn Higgins, Problems and Process: International Law and How We Use It 22 (Oxford 1994).

Virtually all nations have reconfirmed their expectation that every country comply with the prohibition: treaty bodies have clarified that the sentence is prohibited by law, even for the United States; the community of nations has condemned the practice and called for its abolition by any nation that would continue its use; and all other countries that had used the sentence have stopped.

In early 2007, the Committee on the Rights of the Child reiterated that CRC article 37 prohibits the death penalty and life without parole in a General Comment. General Comment No. 10, at para 27.

The prohibition has also been recognized as an obligation under the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXXI), 999 U.N.T.S. 171 (Dec. 16, 1966) (hereinafter "ICCPR"). In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee "is of

the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24)." U.N. Human Rights Comm., Comments on the United States of America, U.N. Doc. CCPR/C/SR 2395 at para 34 (2006) (hereinafter "Comments on the United States").

Prohibition of the juvenile death penalty and juvenile sentences of life without parole is also required to ensure the rights to humane treatment, dignity and personal liberty of children that are codified in the *corpus juris* of the Organization of American States, of which the United States is a member. *See* American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, Art. VII (1948) (establishing right of "all children . . . to special protection, care and aid"); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, art. 19 (18 July 1978) ("Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state"); *Michael Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1, at 913, para. 83 (2002) (Art. 19 of American Convention and Art. VII of American Declaration reflect "the broadly-recognized international obligation of states to provide enhanced protection to children"); *Juridical Conditions and Human Rights of the Child,* Inter-Am. Ct. H.R., Advisory Opinion OC-17/02, Ser. A. No. 17, para. 37 (Aug. 2002) ("Deprivation of liberty of children shall be applied as a measure of last resort and for the

minimum necessary period, and shall be limited to strictly exceptional cases.").

Beyond the rule's clarity in treaty law, a near universal consensus has coalesced over the past fifteen years, even accelerated since 2006, that the sentence must be legally abolished. Myriad United Nations resolutions have passed by consensus or, upon vote, by every country represented except the United States. Every year since 2006, the United Nations General Assembly has adopted in its Rights of the Child resolution a call for the immediate abrogation of the juvenile LWOP sentence by law and practice in any country applying the penalty. For example, by a vote of 185 to one (the United States was the lone dissenter) the General Assembly adopted a resolution on December 19, 2006, calling upon nations to "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offense." Rights of the Child, G.A. Res. 61/146, U.N. Doc. A/Res/61/146, para. 31(a) (Dec. 19, 2006). A similar resolution was adopted by a vote of 183 countries to one in December of 2007 (only the United States voted against), G.A. Res. 62/141, U.N. Doc. A/RES/62/141, para 36(a) (Dec. 18, 2007), and again in 2008 (the United States was the only vote against). G.A. Res. 63/241, U.N. Doc. A/RES/63/241, para 43(a), (Dec. 24, 2008).

The United Nations Human Rights Council included the prohibition in its first substantive resolution on the Rights of the Child, Rights of the

Child, A/HRC/7/RES/29, para. 30(a) (2008), along with prohibition of the death penalty for offenders under the age of 18 at the time of the crime.[7] In 2009 the Council again urged "States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age." Human rights in the administration of justice, in particular of children and juvenile justice, Res. 10/2, U.N. Doc. A/HRC/10/L.11, ¶ 11 (adopted Mar. 25, 2009). In 2005, the U.N. Commission on Human Rights (predecessor to the Council) called for governments to prohibit the juvenile LWOP sentence along with the juvenile death penalty. Rights of the Child, Comm'n on Human Rights 2005/44, U.N. Doc. E/CN.4/RES/2005/44, para. 27(c) (April 20, 2005). This resolution emerged from a series of pronouncements from the Commission, from 1997 through 2004, emphasizing the need for the global community to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time. *Sentencing our Children to Die, supra*, at 1017-18, n.182.

These resolutions followed many years of other pronouncements calling for limited juvenile incarceration. In 1985, for example, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile

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[7] The Commission on Human Rights, created in 1948, was replaced by the Human Rights Council in 2005 which began adopting thematic resolutions in 2007.

Justice, reiterating that confinement shall be imposed only after careful consideration and for the shortest period possible. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, 40 U.N. GAOR Supp. No. 53, at 207, U.N. Doc. A/40/53, Rule 17.1(b) (Nov. 29, 1985). In 1990, the General Assembly passed two other resolutions in support. *See* U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113, Rule 2, (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112, para. 46, (Dec. 14, 1990).

Moreover, as noted above, all other countries that had maintained a JLWOP sentence have ended the practice in accordance with their treaty and international human rights obligations. *Sentencing our Children to Die, supra*, at 996-1004 (e.g., Tanzania committed to allow parole for the one person potentially serving the sentence and to clarify its laws to prohibit it; Israel clarified that parole petitions may be reviewed by its High Court; and South Africa clarified that such sentences are not permitted). That the few remaining countries besides the United States that potentially had juvenile offenders serving such a sentence clarified that they allow for parole hearings in accordance with the international legal norm is further evidence that countries agree no derogation is permitted. All nations are expected to respect the norm, regardless

of objection (even persistent) by a particular country.[8] Restatement § 102 & cmt. k.

3. There is No Other Peremptory Norm Modifying the Prohibition of Juvenile Life Without Parole Sentences

"[A] peremptory norm is subject to modification only by a subsequent norm of international law having the same character." Restatement § 102 & cmt. k. There is no other norm that contradicts the current norm. Rather, as discussed above, the trend is to the contrary, as governments call for abolition of the challenged sentence in law and deed. The prohibition against JLWOP thus satisfies the three requirements for *jus cogens* status.

The norm is international law, and it should inform this Court's analysis of the challenged sentence under the Eighth Amendment.

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[8] *Amici* do not imply that the United States has been a persistent objector, since the doctrine requires that a state object clearly, consistently, and affirmatively both as the norm is in its formative stages and continually as it develops. Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 537 (1993). The United States did not start objecting until this past decade, well past the norm's formative stage. Moreover, in the context of *jus cogens*, there is no exception for persistent objectors.

B. The United States has been Found Out of Compliance with its Treaty Obligations in Allowing Life Without Parole Sentences

In determining whether the United States Constitution permits the challenged sentence, the Court should also consider the mandates of the Supremacy Clause, which provides that "all Treaties made ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2.

The United States is now out of compliance with several human rights treaties to which it is a legal party: the ICCPR, *supra*; the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113, *entered into force,* June 26, 1987, ratified by the United States, Oct. 21, 1994, and the Convention on the Elimination of Racial Discrimination, 660 U.N.T.S. 195, *entered into force,* Jan. 4, 1969, ratified by the United States, Oct. 21, 1994 (hereinafter "CERD").

The treaty bodies that monitor compliance with these treaties all have raised concerns about and/or found the United States specifically out of compliance with its obligations in allowing life without parole sentences for juveniles. Florida, like other states, has an obligation to ensure that its criminal punishments comply with and help the United States meet its international treaty obligations.

As Justice Stevens has stated, "[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation," *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346, 1374 (2008) (concurring opinion), and, in a follow-up opinion emphasized the point, "I wrote separately to make clear my view that Texas retained the authority—and, indeed, the duty as a matter of international law—to remedy the potentially significant breach of the United States' treaty obligations...." *Medellin v. Texas*, 552 U.S.___, 129 S. Ct. 360, 362 (2008) (Stevens, J., dissenting). Compliance with international human rights standards and with treaty obligations should be of particular concern to states, as they carry a large part of the burden to implement obligations related to sentencing and detention.

The express provisions of international treaties and the findings of treaty bodies should be highly relevant to this Court's consideration under the Eighth Amendment, much as it was in *Roper*, 543 U.S. at 576. In *Roper*, the Court examined the CRC's express prohibition of the death penalty and the fact that "parallel prohibitions are contained in other significant international covenants." *Id.* The case for the Court's consideration here, however, is *even stronger* because the treaty bodies charged with overseeing the main treaties that address criminal sentencing to which the United States is a party have specifically found the United States to be out of compliance by allowing juvenile life without parole sentences.

In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing the sentence contravenes article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State," and article 7, which prohibits cruel and unusual punishment. The Human Rights Committee concluded that the United States should ensure that no child offender be given the sentence. Comments on the United States, *supra*, para. 34.

The Committee noted the reservation of the United States to other articles in the treaty which states that:

> The United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.

See Office of the United Nations High Comm'r for Human Rights, ICCPR, http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm. This did not prevent the Committee from finding the United States out of compliance with article 24(1) (noted above), and from registering its concern that the application of the sentence was not imposed only in "exceptional circumstances." *Id.*

The United States currently has more than 2,500 juvenile offenders serving the sentence.

Many of those are for convictions that could not be deemed the worst crimes: an estimated 26% of juvenile offenders are serving JLWOP for felony murder, in which the juvenile was not the person who killed the victim. Human Rights Watch/Amnesty International, *The Rest of Their Lives*, at 27 (2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives-0; and 2009 Update Report, http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf.

In 45 percent of California cases surveyed by Human Rights Watch, youth sentenced to life without parole were convicted for their role in aiding and abetting or participating in a felony. Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California,* at 21 (Jan. 2008), http://www.hrw.org/reports/2008/us0108/. A significant number of those cases involved an attempted crime gone awry—a tragically botched robbery attempt, for example—rather than premeditated murder. Other youths were given the sentence for lesser crimes, as exemplified most poignantly by the cases of petitioners Graham and Sullivan now before this Court.

In significant contrast to the reservation's promise to try children as adults only in "exceptional cases," there are presently some 2,500 juveniles serving life without parole sentences in the United States, including approximately 302 in Florida. *See* Paolo Annino, David Rasmussen, Chelsea Boehme Rice, App. II, Juvenile Life

without Parole for Non-Homicide Offenses: Florida Compared to Nation, (July 14, 2009), http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment," in violation of the treaty. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, at para. 35, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the CERD, found the sentence incompatible with Article 5(a) of the CERD, particularly because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. The Committee referred to both the Human Rights Committee and Committee Against Torture's reports on the United States, noting the concern raised in regard to the sentence, and stated:

> In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the

> persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

CERD, Concluding Observations of the United States, at para 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

The disproportionate use of this sentence is well documented. In a Human Rights Watch survey of 25 states, the rate of black youth per capita serving life without parole sentences was ten times higher than that of white youth and much higher in some states, such as California where the rate of black youth per capita serving the sentence is 18 times higher than white youth. Human Rights Watch, Submission to the Committee on the Elimination of Racial Discrimination, at 21-22 (Feb. 2008), http://www.hrw.org/en/node/62449/section/2. Youth of color in some jurisdictions receive more than 90% of the LWOP sentences given. *Sentencing our Children to Die, supra*, at 993-95.

In light of the foregoing treaty obligations and the Constitution's Supremacy Clause, the Court should consider the views of the bodies authorized to monitor compliance with the treaties

to which the United States is a party in determining whether the sentence of life without parole for a juvenile violates the prohibition of cruel and unusual punishments under the Constitution.

C. The Uniformity and Consistency of International Law and Practice Should Inform the Court's Eighth Amendment Analysis

As enumerated above, this Court has repeatedly recognized the relevance of international law and opinion when considering whether a sentence complies with the Eighth Amendment. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." *Roper*, 543 U.S. at 578 (citations omitted); *see also Enmund*, 458 U.S. at 796, n.22 (death penalty may not be imposed for felony murder, citing the experience of Commonwealth and Western European countries); *Coker*, 433 U.S. at 596 (international opinion relevant in finding death penalty for rape violates Eighth Amendment); *Trop*, 356 U.S. at 102-03 (foreign state practices deemed relevant to determination that denaturalization of military deserter constituted cruel and unusual punishment).

Generally, as this Court has noted, customary international law is "part of our law, and must be ascertained and administered by the

courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). In this regard, the Restatement provides that "[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States" and "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States." Restatement § 111(1) & (3). The principle that customary international law is part of United States law applies with even greater force when considering a peremptory norm. *See, e.g., United States v. Mata-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (torture, murder, genocide and slavery constitute *jus cogens* norms, which are "nonderogable and peremptory, [and] enjoy the highest status within customary international law"); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*."); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 499 (9th Cir. 1992) ("'it would be unthinkable to conclude other than that acts of official torture violate customary international law'") (citation omitted); *Siderman*, 965 F.2d at 715 ("Courts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* look to the same sources, but must also determine whether the international community recognizes the norm as one 'from which no

derogation is permitted'") (citation omitted); *White v. Paulson*, 997 F. Supp. 1380, 1384 (E.D. Wash. 1998) ("This Court can conceive of no adequate reason why the rationale supporting the existence of judicial authority to recognize implied remedies for constitutional rights does not apply with equal or greater force to *jus cogens* norms of international law, such as the prohibitions on genocide, torture, and slavery").

The uniform rejection by the rest of the world of life without parole sentences for juveniles is weighty evidence that the practice is inconsistent with the Eighth Amendment.

III. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS

A majority of this Court has noted that the United Kingdom's experience is instructive to interpreting the Eighth Amendment not just because of the "historic ties" between our two countries but because the Eighth Amendment was derived from the English Declaration of Rights of 1689. *Roper*, 543 U.S. at 577; *Lawrence*, 539 U.S. at 576. The close relationship between the United Kingdom and the United States has a long history and recent developments in world affairs have made that relationship even closer. The President has noted, "the special relationship between the United States and Great Britain is one that is not just important to me, it's important to the American people. And it is sustained by a common language, a

common culture; our legal system is directly inherited from the English system; our system of government reflects many of these same values ...." Remarks of President Obama, Mar. 3, 2009, U.S. Embassy, London, http://www.usembassy.org.uk/gb083.html. The United States not only shares fundamental values with the United Kingdom, but also a common law heritage, as consistently recognized by this Court. *See, e.g.*, Roper, 543 U.S. at 577 ("it is instructive to note that the United Kingdom abolished the juvenile death penalty" before international covenants prohibiting the practice came into being); *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 (1989) (discussing Magna Carta and English Bill of rights in determining scope of Eighth Amendment Excessive Fines Clause); *Ferguson v. Georgia*, 365 U.S. 570, 581-82 (1961) (considering evolution of legal competency of criminal defendants in England and United States); *United States* v. *Lee*, 106 U.S. 196, 205 (1882) (American legal doctrines "derived from the laws and practices of our English ancestors."). Consequently, the experience of British law in determining penalties for juvenile offenders can provide guidance for this Court.

A. Historically, Juvenile Offenders Were Treated with More Leniency Than Adults in the United Kingdom

Historically, juveniles were treated differently from adults in terms of sentencing. The United Kingdom abolished the juvenile death penalty for children under age 16 in 1908, Children

Act of 1908, 8 Edw. 7, c. 67 (Eng.), but death sentences for offenders under 18 had already been rarely imposed since the early 18th century because of sympathy for the young. The Children Act 1908 was "a notable piece of legislation, enshrining as it did in almost every section the principle that a young offender shall receive different treatment from an adult." Report of the Departmental Committee on the Treatment of Young Offenders, 1927 Cmd. 2831. While Parliament could have replaced the death penalty with life imprisonment, it adopted instead the sentence of detention at Her Majesty's pleasure ("HMP"), a "less severe form of sentence" for juveniles. *R v. Secretary of State for the Home Department Ex parte Venables,* [1998] A.C. 407 HL at 521 (per Lord Steyn) (hereinafter "*Venables*"). In particular, "[t]here is built into the sentence a measure of leniency in view of the age of the offender at the time of the offence." *Venables*, A.C. 407 HL at 532 (per Lord Hope of Craighead).

In 1933, the Children and Young Person's Act 1933 (Eng.) abolished the death penalty for all persons under age 21. Parliament's Select Committee on Capital Punishment noted that the instability of young people made them less culpable:

> [T]he emotional balance of young people under the age of 21 is unstable, and this instability reduces their responsibility, and that the instability of adolescents, which in some cases may even amount to a form of mental

> disorder is very often a factor in the crime.

Report of the Select Committee on Capital Punishment (1930) at ¶ 189, 193.

These statutory developments formed part of an "elaborate legislative scheme which reflected a general policy of treating young offenders quite differently from older ones." A. W. B. Simpson, Report prepared for submission to the European Court of Human Rights in *Prem Singh v. United Kingdom*, unreported, (21 Feb. 1996), cited with approval in *Venables* [1998] A.C. 407 HL at 481 (per Lord Goff). The statutory developments were intended to impose an obligation upon the courts "to have regard not only to retribution, deterrence and prevention of risk but also to the welfare of the child offender himself." *Venables* at 498–99 (per Lord Browne-Wilkinson). In other words, historically the legal system in England and Wales has recognized that young people who commit murder or other serious offenses should be treated with greater leniency. "It is clear from the authorities which exist ...that, when dealing with a very young person, the court has to have regard to the length of sentence and the perception of the young of that length. By that we mean that a sentence which may be appropriate for someone older may be crushing for someone who is very young." Mr Justice Collins in *R v. W* [2003] 1 Cr. App. R. (S) 95, 504.

B. Sentencing Juveniles to Life Imprisonment without Parole is Prohibited by Law

In England and Wales, juveniles who commit the most serious or heinous of crimes cannot be given an LWOP sentence; rather, the severest penalty is detention at HMP. Powers of Criminal Courts (Sentencing) Act 2000, § 90 (Eng.). This is significant because, to date, the longest sentence, or *tariff* as it is known, imposed on a juvenile for any crime or combination of crimes committed when under the age of 18 is 30 years. Email from Kevin Breame, Public Protection Casework Section, United Kingdom Ministry of Justice/Home Office (July 15, 2009) (on file with counsel).

The sentence of detention at HMP is the statutorily required sentence for murder convictions in the Crown Court where the offender was at least 10, but under the age of 18, at the time of the crime. Powers of Criminal Courts (Sentencing) Act 2000 § 90. Particularly instructive is that for juvenile offenders who commit serious non-homicide crimes, including the types of crimes committed by petitioners Graham and Sullivan, detention falls under the Powers of Criminal Courts (Sentencing) Act of 2000, § 91, which are even less severe than detention at HMP.

When passing a sentence on a juvenile, including a sentence of detention at HMP, the judge effectively must impose a tariff that is roughly half the term that an adult would be given in the same circumstance. First, *all* prisoners in England and Wales are automatically released at

the halfway point of a determinate sentence and then serve the balance on license, a form of parole, unless a threat to society.[9] Once the term period has elapsed, the offender should be released if the Parole Board is satisfied that it is safe to do so. § 28 of the Crime (Sentences) Act 1997.[10]

Furthermore, for juveniles convicted of murder, the judge starts at a presumptive period of 12 years detention, and then adjusts that term based on aggravating or mitigating factors, such as premeditation or evidence of intent to injure but not kill. Criminal Justice Act 2003 (c. 44) Schedule 21, ¶¶ 7-12. However, Schedule 21, para. 9 states: "Detailed consideration of aggravating or mitigating factors may result in a minimum term of

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[9] There are two parts to a life sentence: the detention period and the license period. The minimum detention period for punitive detention is set by the trial judge, and is commonly referred to as the "tariff period," but may also be referred to as the "minimum term" in the Criminal Justice Act 2003. After the individual has been detained for the period specified in the minimum term, they become eligible to have their release reviewed by the Parole Board. If the Parole Board determines that sufficient progress in rehabilitation during the minimum period has not been made, then the individual will remain detained, with review taking place about once a year. If the Board finds that they are no longer a threat to society, the Board can recommend release, and the offender will be released on "license," under parole review for the remainder of their natural life.

[10] The determination of the tariff or minimum term in relation to mandatory life sentences, for example, requires the trial judge to specify in the order that the early release provisions (of the Crime (Sentences) Act 1997, paras. 5-8) will apply after a minimum term of detention.

any length (whatever the starting point), or in the making of a whole life order." But Schedule 21, para. 1, makes clear that 'whole life order' means an order made under §269(4) – and §269(4) does not allow for imposition of LWOP on a juvenile. Significantly, as indicated above, the longest tariff imposed on a person who committed any crime when under age 18 years is 30 years.

In sum, the laws of England and Wales legally and effectively prohibit life without parole sentences for juvenile offenders. While it is not clear that such a sentence was ever used, it clearly has been prohibited for the better part of the past seventy-five years. The prohibition emerged historically in recognition of the inherent instability and emotional imbalance of persons under age 18, which made such sentences cruel and unusual. In recognition of the special relationship between English jurisprudence and this country, and the direct roots of the Eighth Amendment in English law, this Court should follow suit and recognize that the Eighth Amendment prohibits imposition of life without parole sentences for juvenile offenders.

IV. CONCLUSION

In considering constitutional values related to the death penalty, the most severe punishment of juveniles, this Court in *Roper* observed:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime

> reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under [eighteen] as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under [eighteen] as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. *Roper*, 543 U.S. at 573–74 (citations omitted).

As it did in relation to the juvenile death penalty, this Court should find these same

principles, which have been applied to universally condemn in international law and practice the sentencing of juveniles to life in prison without parole, instructive in interpreting the Eighth Amendment here. For the reasons stated above, the sentences of Mr. Graham and Mr. Sullivan should be overturned.

Respectfully Submitted,

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New Zealand Law Society
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[11] Research assistance was provided by students at the University of San Francisco School of Law, Columbia Law School and the Center for Constitutional Rights; and Molly Newland at Sheppard Mullin Richter & Hampton LLP.

APPENDIX

Amnesty International is a worldwide human rights movement of more than 2.2 million members and subscribers. It works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. It has addressed the issue of juvenile life without parole and co-published the report *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005).

The Amsterdam Bar Association is a local Bar Association, which is an autonomous public-law body. Local Bar Associations in the Netherlands promote decent exercise of law practice and are authorized to take all measures that can contribute thereto. Pursuant to the Act on Advocates, advocates are obliged to become a member of the Bar. The Amsterdam Bar notes that the subject matter of juvenile sentences is very important from a Dutch point of view.

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally

recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons*, 543 U.S. 551 (2005).

The Bar of Montreal, with over 12,500 members, is one of the largest bar associations in the world, as well as being the second largest French-speaking bar association. Its members' expertise covers all aspects of the legal practice, administration and business. Many of its members are recognized nationally and internationally in these fields. With more than 160 years of history, the Bar of Montreal is considered a model for its leadership in the pursuit of excellence in ethics and high standards of competence. The Bar of Montreal's mission is to protect the public. With this in mind, the Bar organizes a number of activities each year which inform members of the public of their legal rights and how they are to be exercised.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational

organization committed to the creative use of law as a positive force for social change.

The Columbia Law School Human Rights Clinic bridges theory and practice by providing students with hands-on experience working on active human rights cases and projects. Working in partnership with experienced attorneys and institutions engaged in human rights activism, both in the United States and abroad, students contribute to effecting positive change locally and globally. In recent years, the Human Rights Clinic has worked on several matters concerning human rights issues in the United States, including *In re Juveniles Sentenced to Life Without Parole in the United States of America*, Petition P-161-06, Inter-Am. C.H.R. (2006), concerning the mandatory sentencing of juveniles in Michigan to life without the possibility of parole.

The Hong Kong Bar Association is the professional organization of Barristers in Hong Kong. Its objects are generally to consider and to take proper action on all matters affecting the legal profession and the administration of justice. It is also keen to promote the upholding of human rights and the rule of law. The Association is governed by the Bar Council, an executive committee comprising elected and co-opted members representing different standings at the Bar. All matters of policy are decided by the Bar Council and its various Special Committees. The Association is joining as a signatory to this Brief to endorse what it sees as the well-settled prevailing international standard on the relevant point in

issue, and to present it to this Court for its consideration.

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. Human Rights Advocates has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for over 25 years, where it has addressed the issue of juvenile sentencing. Human Rights Advocates has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal law. Cases that it has participated in include: *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

The Law Council of Australia is the national body representing the Australian legal profession at home and overseas and maintains close relationships with legal professional bodies throughout the world. The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council speaks on issues of national and international importance. The Law Council considers this case concerning juvenile justice and human rights to be one such issue. Therefore, the Law Council supports the *amicus curiae* brief being

submitted to the Supreme Court of the United States on behalf of the petitioners Graham and Sullivan.

The Law Society of England and Wales is the professional body representing more than 138,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world. The Law Society has made submissions as *amicus curiae* to this Court on a number of previous occasions.

The Law Society of Ireland is the representative body of Ireland's 12,000 solicitors. The Law Society, through the work of its Human Rights Committee, aims to raise awareness in the profession and the public of human rights, to uphold human rights in the administration of justice, to promote and support international human rights and to promote and support lawyers working for the implementation of international human rights standards. The Law Society would like to lend its support to the *amicus curiae* brief to be submitted to the Supreme Court of the United States on this matter.

The Netherlands Bar Association is the public law based professional organization of which all 16000 Dutch lawyers (advocates) are compulsory members. The core activity is promoting and overseeing the quality and integrity of the lawyer. The Netherlands Bar does not serve the lawyers' interests but the general interests of delivering good legal aid to everyone who needs it.

The Bar has regulatory powers and upholds a strong disciplinary system. The Bar defends and promotes the enforcement of the rule of law and human rights.

The New Zealand Law Society is a professional body which regulates all barristers and solicitors in New Zealand and represents all practitioners who hold practicing certificates as members. The Society has a current membership of over 10,600 practitioners. Aside from regulating and controlling the practice of the profession of law in New Zealand, the Society is active in assisting and promoting the reform of the law, for the purpose of upholding the rule of law and the administration of justice.

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights has a strong interest in ensuring that the United States construe its authority to detain persons in a way that is consistent with international human rights standards and to adhere to the United States' non-derogable obligations.

The Union Internationale des Avocats (UIA) was created in 1927 by a group of French speaking European lawyers convinced of the need for lawyers to establish international contacts. Today, the UIA is an association open to all lawyers of the world, made up of both general and specialist practitioners, counting more than 200 bar associations, organizations or federations (representing nearly two million lawyers) as well as several thousand individual members from over 110 countries.

AMICUS CURIAE BRIEF

(19) (19)

No. 08-7621 and 08-7412

In the

Supreme Court of the United States

JOE HARRIS SULLIVAN,

Petitioner,

v.

FLORIDA,

Respondent.

and

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

FLORIDA,

Respondent.

On Writ of Certiorari to the
District Court of Appeal of Florida, First District

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QUESTION PRESENTED

Does the Eighth Amendment's prohibition on cruel and unusual punishment prohibit a state legislature from setting a punishment of life in prison without parole for heinous crime committed by juveniles?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I FMRI ANALYSIS IS UNRELIABLE AND IS INADMISSIBLE UNDER A RULE 702 ANALYSIS 4

II THE THEORIES ON WHICH THE AMA AMICUS BRIEF RELIES DO NOT SATISFY THE PEER REVIEW, PUBLICATION, AND GENERAL ACCEPTANCE IN THE RELEVANT SCIENTIFIC COMMUNITY ANAYLSIS UNDER *DAUBERT* 12

III THE COURT MAY NOT RELY ON UNCERTAIN SCIENTIFIC THEORY TO OVERRULE A LEGISLATIVE POLICY JUDGMENT 23

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 1

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IDENTITY AND INTEREST OF AMICUS

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the policy-making role of state legislatures. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this court is one of special importance to the plan of the Constitution. Although framed by some amici as a question of medical science, that science is far from established. That developing science may inform legislative policy judgments, but it cannot provide a

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

basis for the federal courts to usurp that policy-making function.

SUMMARY OF ARGUMENT

The "scientific" evidence presented in the American Medical Association and the American Academy of Child and Adolescent Psychiatry Amicus Brief is far from being established as accepted scientific fact. The tests, results, and interpretation of those results cannot yet meet admissibility and reliability standards as established by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is the type of developing science that may be relied on by legislatures as they consider policy choices, but is not the type of established and accepted science that a court may use to overturn those policy choices.

In designing our system of government, the Founders vested the legislative branch with the power to make policy. While the judicial power exists to ensure that legislative policy-making stays within the outer bounds established by the Constitution, the judicial branch was not granted a broad power to overrule policy choices on the basis of a dispute over which policy may be wisest. Science cannot yet provide a reliable basis for concluding that the policy choice of the Florida legislature in this case was either "correct" or "erroneous." This Court cannot rely on the scientific theories presented in the AMA brief, therefore, to overrule the state's policy choice.

ARGUMENT

As one paper suggests, "the language of law is vastly different from the language of neuroscience.

Matching neurological data to legal criteria can be much like performing a chemical analysis of a cheesecake to find out whether it was baked with love."[2]

The argument that the juvenile brain is too insufficiently developed to constitutionally permit imposition of life in prison without the possibility of parole (LWOP) for the most heinous and violent criminal offenses is predicated on advocacy masquerading as science. In *Daubert*, and as later explained in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), this Court established the criteria by which all expert testimony is to be measured prior to its admission as evidence in a trial setting. The purpose of these criteria "is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. These cases do not require that the scientific opinion be "undisputed," but they do require that the opinion be "scientifically valid." *Daubert*, 509 U.S. at 592-93. This Court should, at a minimum, use the same criteria to test an argument presented as "scientific proof" that a legislative choice is constitutionally illegitimate.

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[2] Eyal Aharoni, et al., *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124 Ann. N.Y. Acad. Sci. 145, 146 (2008).

The guidelines to determine relevance and reliability of claimed scientific proof include: whether the procedure has been tested under field conditions, whether it has been subject to peer review and publication, the known or potential error rate, whether standards for the operation of the technique have been developed, and whether the procedure is generally accepted in the scientific community. No single factor is dispositive. *Kumho*, 526 U.S. at 151. However, "a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Id.* at 152.

The *Daubert* factors that should bear the greatest scrutiny in the case at bar are the potential error rates, peer review, publication, and general acceptance in the relevant scientific community of the theories championed by the AMA/AACAP Brief.

I

FMRI ANALYSIS IS UNRELIABLE AND IS INADMISSIBLE UNDER A RULE 702 ANALYSIS

The AMA/AACAP Brief opens with a remarkable statement: "In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult." What makes the statement so stunning and so dangerous is that it is the preamble for a public policy position that juveniles should not be held fully accountable for committing aggravated first degree murder, aggravated rape, torture and the other limited classes of crimes for which the term of life in prison without the possibility of parole exists.

The AMA/AACAP Brief includes a number of citations to published papers as support for its position that juveniles cannot be expected to avoid engaging in criminal conduct. None of the cited authorities actually supports that proposition. Not one of the cited authorities establishes that juvenile brain development is the source of juvenile crime or a basis to nullify the states' right to impose sanctions for criminal conduct.

Juveniles are treated differently in the vast majority of criminal cases. A juvenile caught joy-riding in a stolen car or shoplifting a six-pack of beer is treated far differently than an adult. There is a focus in juvenile court on rehabilitation and reformation. That differentiation necessarily yields to a state's right to protect its citizens when the juvenile commits the types of atrocious crimes that qualify for terms of life in prison without the possibility of parole. At that point the AMA/AACAP Brief's simplistic rendition of "kids will be kids" falls flat.

The AMA/AACAP Brief is remarkably silent on the challenges to the types of fMRI (functional Magnetic Resonance Imaging) studies it cites. Two major papers published in 2009 in prominent journals that document error rates of over 50% in published fMRI studies are conspicuously absent.

As this Court stated in *Daubert*, "[t]he Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 579-80. As described below, the theories set forth

in the AMA/AACAP Brief fail to satisfy the threshold requirements of Rule 702 as described in *Daubert*. There is no evidence whatsoever that brain development has a causal link with criminal conduct. Without that predicate fact, fMRI analysis of any brain, juvenile or adult, is irrelevant. *Id.* at 593. Even if it were relevant, the controversy over the methodology used in fMRI analysis renders such studies untrustworthy and demonstrates a potential error rate that compels its exclusion pursuant to Rule 702.

The AMA/AACAP Brief argues that juvenile brains are not as fully developed as adult brains. It goes a step further and argues that the difference in brain development causes juveniles to engage in more risk-taking behavior as well as other behavioral traits. What is completely lacking is any evidence linking those claims to the inference that juvenile brain development causes juvenile crime. There certainly is no evidence to support the additional inference that juvenile brain development is a scientific basis for mitigating the punishment for juveniles who commit the heinous crimes that qualify for terms of life in prison without the possibility of parole.

The opponents to lengthy juvenile sentences have the cart well before the horse. They have argued that juvenile brains are not fully developed and that the developmental differences are manifested in risk-taking behavior and reward-based decision making. From that tenuous perch they leap to the conclusion that juvenile brain development must also account for juvenile crime. That leap is based on an inference born out of a social policy

position and is not supported by relevant, admissible evidence.

In *Daubert* Justice Blackman wrote,

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."

Id. at 593 (citation omitted). Functional brain imaging fails that standard.

A 2009 published study authored by scientists from the Massachusetts Institute of Technology and the University of California, San Diego, entitled *Puzzlingly High Correlations in fMRI Studies of Emotion, Personality, and Social Cognition*[3] (hereinafter *fMRI Study*) addressed the problems observed in the methodology behind the current rash of fMRI studies.

The authors of the *fMRI Study* identified 55 published articles involving fMRI analysis where fMRI testing was linked with some form of

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[3] Edward Vul, et al., *Puzzlingly High Correlations in fMRI Studies of Emotion, Personality, and Social Cognition*, 4 Perspectives in Psychological Science 319 (2009). This study was formerly known as *Voodoo Correlations in Social Neuroscience*.

behavioral trait relating to emotion, personality, or social cognition. The *fMRI Study* was able to obtain methodological details from the authors of 52 of the 55 articles. Of those, 54% used methodology that rendered the conclusions untrustworthy and of no scientific value.

The *fMRI Study* is not the only prominent critique of the methodology used in a significant percentage of published fMRI analysis. Another 2009 study published by four researchers at the National Institute of Mental Health entitled *Circular Analysis in Systems Neuroscience: The Dangers of Double Dipping*[4] (hereinafter *Circular Analysis Report*) documented the same methodological problems.[5]

The *Circular Analysis Report* examined all of the fMRI studies published in 2008 in five prestigious journals (*Nature*, *Science*, *Nature Neuroscience*, *Neuron*, and *Journal of Neuroscience*). The authors were able to identify 134 published papers.[6]

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[4] Nikolaus Kriegeskorte, et al., *Circular Analysis in Systems Neuroscience: The Dangers of Double Dipping*, 12 Nature Neuroscience 5 (2009).

[5] "A notorious drawback of research in fMRI scanning technology is its meager temporal resolution. A tremendous amount of activity can occur in the brain in a matter of seconds." Aharoni, *supra*, at 158.

[6] The sheer number of studies—nearly three per week—identified by the authors of the *Circular Analysis Report* strongly suggests that the field of study surrounding fMRI is anything but settled science.

Of the 134 published papers, 42% shared a common significant error in methodology. *Id.* Another 14% could not even be evaluated because the methodological information given was insufficient to reach a conclusion. *Id.*

The AMA/AACP Brief has presented their argument in a manner that suggests that there exist no problems with the science involved in neuroimaging. However, there is not a single published case upholding the use of functional brain imaging technology in the guilt phase of a trial. One cannot simply look at a person's brain and infer the presence or absence of a culpable mental state.[7]

The problems documented above fall squarely within the language of *Daubert* and Rule 702. This Court stated,

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[7] It had been argued that "statements such as, 'My genes made me do it,' 'My upbringing made me do it,' and 'My Twinkie made me do it' are not popularly compelling excuses in modern jurisdictions, so 'My brain made me do it' should not be exculpatory either." Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona*; 97 J. Crim. Law & Criminology (June 22, 2007). Nevertheless, see Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 Phil. Trans. R. Soc. Lond. B 1775 (2004). Also found in Semir Zeki & Oliver Goodenough, eds., *Law and the Brain* (2006). It is significant to note that Greene and Cohen believe that no one, fully developed adult or adolescent, is responsible for their actions, because their brains made them do it. Thus, according to Greene and Cohen, the debate regarding whether juveniles should receive LWOP sentences is merely an intellectual exercise that has no relevance, in that no one is responsible for their actions.

> Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, *see, e.g., United States v. Smith*, 869 F.2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, *see United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), *cert. denied*, 439 U.S. 1117, 99 S. Ct. 1025, 59 L.Ed.2d 77 (1979)."

Daubert, 509 U.S. at 594.

The documented error rate in fMRI studies is of great concern when the technology is used to try to explain or even to mitigate criminal conduct. The danger is compounded by the likelihood that a significant amount of error will result, either intentionally or unintentionally, from a desire to advocate for a strongly held public policy position. The *fMRI Study* and the *Circular Analysis Report* demonstrate why *Daubert* and Rule 702 render the opinions based on fMRI studies and other functional brain imaging techniques inadmissible.

There is an additional problem generated by the methodology used in functional brain imaging. To what are the results to be compared? What is a "normal" brain for purposes of comparison? When one attempts to narrow the focus to alleged differences between a juvenile brain and an adult brain the question becomes even more glaring.

Does one compare the functional brain imaging results of all subjects under the age of eighteen with what someone arbitrarily selects as having the "normal" brain of a nineteen year old? Should the "normal" brain be defined as a "normal" twenty year old, thirty year old, or perhaps the "normal" brain of a forty-five year old?

Should comparisons be made across gender lines or within gender lines? Should the functional brain imaging results of female juvenile subjects be compared to a "normal" adult male? Should a juvenile male subject's functional brain imaging results be compared to the "normal" brain of a thirty (30) year old female?

The questions become overwhelming when one expands the questioning to sexual orientation, particular aptitudes such as art, analytical reasoning, or even documented differences between individuals who process information more with the left side of their brain versus the right. If the constitution mandates that a state must take brain development and function into account before the state can act to ensure the public safety of its citizens, where does the inquiry stop?[8]

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[8] The problematic nature of defining "normal," particularly in a forensic analysis, was highlighted in the study *Limitations of Brain Imaging in Forensic Psychiatry*. The authors stated,

> The definition of normal is still more slippery in forensic evaluations in which the brain activity being evaluated is purported to relate to function or behavior. In this situation, the psychiatrist should be aware of the period for which the definition of normal properly holds. Because the brain exhibits

— *continued* —

The attempt by the AMA/AACAP Brief to correlate criminal conduct with brain development leads to an absurd conclusion. If brain development is the basis for criminal culpability we need to have different, constitutionally mandated standards for men versus women, gays versus straight, left-brained people versus right-brained people, artistic people versus analytic people as well as other variations to numerous to mention. The other option is to recognize what our history and founding documents have consistently supported: States have the right and obligation to hold individuals accountable for their decision to engage in criminal conduct.

II

THE THEORIES ON WHICH THE AMA AMICUS BRIEF RELIES DO NOT SATISFY THE PEER REVIEW, PUBLICATION, AND GENERAL ACCEPTANCE IN THE RELEVANT SCIENTIFIC COMMUNITY ANAYLSIS UNDER *DAUBERT*

The AMA/AACAP Brief presents their argument as if it were settled science. The brief ascribes to the view that adolescents of all ages cannot and should not be held responsible for their actions by LWOP

> elasticity—a dynamic state of continuous adjustment to external and internal stimuli—an image taken at one time, may not resemble the image taken in the same subject at a different time. Yet both images could reflect normal function.

Donald Reeves, et al., *Limitations of Brain Imaging in Forensic Psychiatry*, 31 J. Am. Acad. Psychiatry Law 89 (2003)

sentences, because their brains are not as developed as "normal" adult brains. This is not settled science, as the following references will demonstrate.[9] In fact, there is a growing degree of skepticism, speculation, and more reasoned assessment associated with neurological evidence in general, and the neurological community appears to have stepped back and attempted more accurately to assess the reality of the state of the science of neuroimaging.[10]

"How might neuroscience determine whether a particular person performed a particular act intentionally?" The answer offered in one article is a direct refutation of the conclusions propounded by the AMA/AACAP Brief. Neuroimaging technology cannot demonstrate the presence or absence of intent for a particular crime charged, because "there is no known way to retroactively observe the state of the brain as it was during the commission of the offense. It still might be possible to answer this question indirectly and probabilistically by showing that the individual probably lacked the ability to form plans or intentions."[11]

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[9] Indeed, it is significant to note that a large number of the following references offered in this section post date this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005).

[10] Nevertheless, *see* footnote 24, *infra*, wherein some of the more "innovative" uses for neuroimaging technology are discussed.

[11] Aharoni, *supra*, at 156. "Moreover, if strong evidence of specific brain dysfunction is found, this alone does not necessarily imply innocence or impunity because, after all, most individuals with similar dysfunction never commit crimes. . . . [T]here are several missing links in the connection between neuroscience and responsibility."

Is a trial court to base *Daubert* admissibility on "probably?" This article goes on to point out that even if one were successfully to perform tests on a brain with the goal of ascertaining whether the anticipated part of the brain activates during "intentional" acts, there exist too many variables to conclude an actual cause and effect. In other words, even where it appears that the brain has difficulty forming "intent," it is impossible to determine (without speculation) what caused the inability to form the intent. (The opposite is also true.) The problem is that "it does not necessarily follow that abnormalities in this region imply an inability to form intentions."[12] Furthermore, there is no evidence that the obstacles described above can be assessed in adolescents when they cannot be accomplished for adults.

This conclusion alone calls into question the very basis upon which the AMA/AACAP Brief stands. If the scans are unreliable, then the conclusions which result from those scans are unreliable. Accordingly, the very science upon which the AMA/AACAP Brief relies becomes irrelevant and inadmissible to the issue of LWOP for juvenile offenders. If this so-called evidence fails to stand up to the *Daubert* test of admissibility, how can it be the basis for ruling that the Constitution prohibits legislatures from deciding that juveniles of any age who commit heinous crimes cannot be sentenced to life without parole?

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[12] Aharoni, *supra*, at 151-52.

A recent article[13] points out ten "worries and problems" related to neuroimaging that significantly demonstrate the lack of scientific consensus and general acceptance in the scientific community. The author opines that these ten facts collectively demonstrate "the fact that modern neuroimaging techniques are still in their infancy, that they are still an inexact science." Accordingly, neuroscientists and the legal community would be well advised to exercise care and skepticism regarding the conclusions based upon the science involved.[14] A few of the salient points are discussed below.

Not all people with abnormal brains commit crimes.[15] Indeed, most individuals with similar brain dysfunctions never commit crimes.[16] Current understanding of how the human brain actually

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[13] Nicole A. Vincent, *Neuroimaging and Responsibility Assessments*, Springerlink.com, Jan. 21, 2009.

[14] *Id.* at n.9. The author goes on to say that ultimately some of these problems may be resolved; however their significance casts serious doubt as to the relevance and admissibility of such scan evidence in trial.

[15] *See also* Aharoni, *supra*, at 156 "if strong evidence of specific brain dysfunction is found, this alone does not necessarily imply innocence or impunity because, after all, most individuals with similar dysfunction never commit crimes." It should be noted that the AMA/AACAP Brief does not explain why so few adolescents commit the heinous crimes that usually qualify for LWOP despite the differences they adduce.

[16] *See* Aharoni, *supra*. *See also* Scott T. Grafton, et al., *Brain Scans Go Legal*, Scientific American Mind, Dec. 2006/Jan. 2007.

works on many levels remains rudimentary.[17] Methodological and technological problems with current neuroimaging techniques cast doubt over the usefulness of neuroimaging data.[18] In the current

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[17] *See* Daniel R. Weinberger, et al., *The Adolescent Brain: A Work in Progress* 4 (June 2005), *available at* http://www.theationlcampaign.org/resources/pdf/BRAIN.pdf (last visited Sept. 20, 2009). The authors conclude: "More research is needed to fully understand the brain development, including the relative influence of genetic and environmental factors and how much of the brain's developing 'wiring diagram' process is automatic versus how much is susceptible to manipulation and intervention." *See also* Neil K. Aggarwal, *Neuroimaging, Culture, and Forensic Psychiatry*, 37 J. Am. Acad. Psychiatry Law 239 (2009).

[18] *See* Michael S. Gazzaniga, *Facts, Fictions and the Future of Neuroethics* 8 (2006) (citation omitted).

> With new neuroimaging techniques, lawyers and investigators are excited by the possibilities of being able to identify areas of the brain responsible for everything from violent behavior to lying. If we can put someone in a scanner and see if they are lying, or identify brains that are angrier than others, can't this information be used to prove or defend against guilt in a court of law? In fact, the answer should be an emphatic no. While the advances in neuroimaging techniques are exciting, they are not reductive in this way. Being able to see an area of the brain light up in response to certain questions . . . may reveal some fascinating things about how certain cognitive states may work, but it is dangerous and simply wrong to use such data as irrefutable evidence about such cognitive states. What we know about brain function and brain responses is not always interpretable in a single way and therefore should not be used as infallible evidence the way DNA evidence is infallible.

state of modern neuroscience, it is impossible to go back in time and determine what capacities persons had at the time they committed their crimes. There is no known way retroactively to observe the state of the brain as it was during the commission of the offense. It still might be possible to answer this question indirectly by showing that the individual *probably* lacked the ability to form plans or intentions.[19] Social factors, and not just neurological impairments, also play some role in determining our behavior.[20]

See also Aggarwal, *supra*: "First, the neuroimaging technology in its present state is poorly understood. Second, functional neuroimaging as an instrument cannot properly measure sociolegal values such as intentionality. Third, functional neuroimaging may subvert theories of individual agency with major consequences."

See also Reeves, *supra*. The authors refer to problems relating to the differences in technicians, choosing color variations, reading results, and even the type of machine used—all of which will cause differences in interpretation of the results.

[19] *See* Aharoni, *supra*, at 151.

> How might neuroscience determine whether a particular person performed a particular act intentionally? Unfortunately, modern neuroscience is in no position to demonstrate a lack of intention for the particular crime charged because of course there is no known way to retroactively observe the state of the brain as it was during the commission of the offense.

See also Aggarwal, *supra*.

[20] Moreover, the AMA/AACAP Brief does not explain why there are such different rates of serious adolescent offending across
— *continued* —

If neuroimaging can be used to exculpate, it certainly may be used to *establish* criminal liability.[21] Regarding this last point, Stephen J. Morse argues that most people who wish to inject neuroscience into criminal responsibility assessments believe that the neuroscience must necessarily be exculpatory. We have seen that this does not follow, and, indeed, even if neuroscience could be demonstrated to be routinely relevant, it is

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different developed nations despite the similarities in brain development. *See* Gazzaniga, *supra*, at 12.

> Although cognitive neuroscience continues to show us how the brain is an automatic machine, and that many of our actions are predetermined by our brains and our mind often concocts the rationale for the action after the fact, that does not mean that human behavior is predetermined and automatic. We still have personal responsibility. Not all schizophrenics are violent and not all people raised by bad parents are criminals. 'My brain made me do it' is not an excuse.

[21] In Aharoni, *supra*, at 145, the authors offer the following reflection:

> Can the best neuroscientific evidence available today reduce or even rule out criminal responsibility? Many scientists, lawyers, defendants, and media representatives are already eagerly answering "yes." Others are enthusiastic that such evidence could be used by prosecutors to *establish* criminal responsibility. However, the utmost caution must be taken in making these claims because false conclusions are likely to cost real lives and livelihoods. As some of us have argued previously, the worth of neuroscience in criminal decisions is far from obvious, in part because there is not, and will never be, a brain correlate of responsibility.

a knife that cuts both ways. Unless one makes the fundamental psycholegal error of believing that causation *per se* excuses, it is clear that neuroscience might also be a means to inculpate.[22]

Perhaps more significantly, there already exist examples in the international community wherein criminal liability was founded on neuroimaging technology. In 2007, it was announced in Britain that convicted pedophiles must submit to MRI scans in order to measure the likelihood of re-offense.[23] In 2008, in India, two individuals were convicted of murder largely based upon Brain Electrical Oscillations Signature (BEOS), a form of "brain fingerprinting" using EEG electrodes to measure electrical signals in the brain. The purpose was to measure whether the accused had "experiential knowledge" of the events in question.[24] However, inclupatory use of MRI and EEG technology faces the same questions of scientific validity as does the

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[22] Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio S. J. Crim. Law 397 (2006).

[23] Ben Leapman, *Crooks May Face 'Sci-Fi' Brain Scan*, The Daily Telegraph, Feb. 11, 2007, *available at* http://www.elegraph.co.uk/news/uknews/1542300/Crooks-may-face-%27sci-fi%27-brain-scan.html (last visited Sept. 20, 2009).

[24] Nitasha Natu, *This Brain Test Maps the Truth*, The Times of India, July 21, 2008, at 1; M. Raghava, *Stop Using Brain Mapping for Investigation and as Evidence*, The Hindu, Sept. 6, 2008, at 1; Anand Giridhardas, *India's Novel Use of Brain Scans in Courts is Debated*, The New York Times, Sept. 14, 2008, at A10.

exculpatory use proposed by the AMA/AACAP brief.[25]

Regarding *Daubert* admissibility, one final argument must be made concerning the position of the AMA/AACAP Brief. One leading author describes the position of AMA/AACAP Brief as "myth" and frames the position of the AMA/AACAP Brief as follows:

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[25] There are additional areas of concern regarding the direction some neuroimaging research is heading, "lie detection" and "mind reading." *E.g.*, *see*, Paul S. Appelbaum, *The New Lie Detectors: Neuroscience, Deception, and the Courts*, 58 Psychiatric Services 460 (Apr. 2007); Charles N.W. Keckler, *Cross-Examining the Brain: A Legal Analysis of Neural Imaging for Credibility Impeachment*, 57 Hastings L.J. 509 (2006); Paul Root Wolpe, et al., *Emerging Neurotechnologies for Lie-Detection: Promises and Perils*, 5 Am. J. Bioethics 39 (2005); *Harrington v. Iowa*, 659 N.W.2d 509 (Iowa 2003); Daniel D. Langleben, et al., *Telling Truth From Lie in Individual Subjects With Fast Event-Related fMRI*, 26 Human Brain Mapping 262 (2005); F. Andrew Kozel, et al., *Detecting Deception Using Functional Magnetic Resonance Imaging*, 58 Biological Psychiatry 605 (2005); Richard G. Boire, *Searching the Brain: The Fourth Amendment Implications of Brain-Based Deception Detection Devices*, 5 Am. J. Bioeth. 62 (2005); Henry T. Greely, *Premarket Approval for Lie Detections: An Idea Whose Time May Be Coming*, 5 Am. J. Bioeth. 50 (2005); Daniel D. Langleben & Frank M. Dattilio, *Commentary: The Future of Forensic Functional Brain Imaging*, 36 J. Am. Acad. Psychiatry Law 502, 503 (2008), wherein the authors opine, "Mind-reading with fMRI is scientifically more challenging and even less developed than lie detection, yet it is of great interest and relevance to forensic psychiatry." Presumably, had the authors not meant "mind-reading" in the vernacular sense of the phrase, they would have chosen another, more accurate phrase.

- Executive function is mediated by areas in the prefrontal cortex.
- These areas are not functionally connected to other regions of the brain that are involved in emotional regulation, risk taking, or sensation seeking.
- The regions involved in emotional reactions do not begin to form functional connections with regions mediating executive function until the child is well into adolescence.
- We should therefore understand that certain types of "foolish" adolescent behavior occur as a result of immature or non-existent connections in these brain structures.[26]

The author points out that many aspects of this story that are *falsifiable*.[27] "Some parts of the myth hold up well, while other parts don't hold up at all."[28]

The author goes on to make the following points:

> First, it is not true that behaviors associated with executive function are unavailable to teenagers. . . . It is true that executive function can be dramatically improved as children evolve through puberty, which may be part of the myth's origin. . . . Behaviors like teenaged

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[26] John J. Medina, *The Teenaged Brain: Part 1*, 26 Psychiatric Times 3 (2009).

[27] *See Daubert*, 509 U.S. at 593.

[28] Medina, *The Teenaged Brain: Part 1*, *supra*.

predilections toward sensation and risk-taking do not hold up as well, however.[29]

"Noninvasive imaging, such as fMRI, is a great and powerful technology, but it provides no easy answers in our quest to understand how the brain processes information."[30] "We are only in the beginning stages of our understanding of the relationship between adolescence and mental health."[31] "If we could only just discover what the psychiatric anomalies were telling us, we might have greater insight into what happens normally. Finally,

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[29] *Id.* at 4 (emphasis added). The author explains:

> The idea is that regions in the brain naturally involved in reward-seeking should be more actively engaged in teenagers under tests that require reward seeking. They should then die down as the predilection for the behavior diminishes with age. The focus is usually on the nucleus accumbens and even the ventral tegmental areas, which makes sense, given their natural role in reward-seeking behavior. *Not everybody in the teenaged test cohorts shows such dramatic increases, however. Some researchers have actually found the opposite*—a decrease in blood flow associated with increased risk-taking behavior. *Some studies show increases to these areas in response to reward-seeking tasks, regardless of age.* There are also the normal "chicken and egg" questions that plague so much of this type of research. Does the increase in blood flow create the behavior, or does the behavior create the increase in blood flow?

[30] John J. Medina, *Functional Magnetic Resonance Imaging: Round 2*, 26 Psychiatric Times 5 (2009).

[31] John J. Medina, *The Teenaged Brain: Part 2*, 26 Psychiatric Times 1 (2009).

we might begin to understand what is going on in the minds of our adolescents—a hope no doubt echoed by every researcher interested in the biological basis of puberty."[32]

Accordingly, the scientific theory presented in the AMA/AACAP brief does not meet the standard for admissibility established by this Court.

III

THE COURT MAY NOT RELY ON UNCERTAIN SCIENTIFIC THEORY TO OVERRULE A LEGISLATIVE POLICY JUDGMENT

As demonstrated above, there is a wide-spread dispute amongst the scientific community regarding the validity of the theory regarding adolescent brain development propounded in the AMA/AACAP Brief. Since the scientific community is embroiled in controversy regarding the AMA/AACAP's assertions, these claims cannot serve as the unassailable basis of a legal or political decision regarding whether or not it is permissible to allow adolescents to be given terms of imprisonment of life without the possibility of parole. A decision to allow such sentences to be imposed, since it cannot depend solely on settled science, must be a matter of policy. This decision, then, should be committed to the federal or state legislatures since they are the competent policy making governmental entities with respect to the criminal law.

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[32] *Id.* at 4.

The founders considered the legislative branch of their recently formed republican government to be vested with the discretion to make policy decisions regarding the development of law. *See, e.g.*, James Madison, *Helvidius No. 1*, *in* JAMES MADISON: WRITINGS 540-41 (2d ed. 1999) ("The natural province . . . of the legislature is to make laws."). On the other hand, the founders believed that the judiciary had a more limited role of applying the law to specific cases and review legislative and executive acts to the extent necessary to ensure that they were not inconsistent with the federal constitution. For example, Alexander Hamilton, in response to fears of judicial overreaching, drew attention to the founders' understanding that

> [t]he legislature not only commands the purse, but *prescribes the rules by which the duties and rights of every citizen are to be regulated*. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. *It may truly be said to have neither FORCE nor WILL, but merely judgment*; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The Federalist, No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). According to founders, then, separation of the power to judge and the power to make law and policy was one character of the newly formed republic. Indeed, this separation of the judicial and legislative powers was something more

than a mere trait—it was an essential component for the success of republican enterprise. James Madison turned to "[t]he oracle who is always consulted and cited on this subject," the "celebrated" Montesquieu for the statement that "'[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for the judge would then be the legislator.'" *The Federalist*, No. 47, at 301-03 (James Madison).[33]

Of course, these statements by the Founders, were in reference to the *federal* judiciary and the *federal* legislature. However, the principle which they adamantly propound is equally applicable to judicial review of state legislative decisions. Even in reviewing state law, the federal judiciary must refrain from overreaching and making decisions of policy. Uncertain scientific theory cannot be the basis of a judicial decision to overrule a legislative policy judgment. It is the role of the state legislatures to balance policy concerns in deciding what the law should be.[34]

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[33] The federal judiciary certainly retains the power "to pronounce legislative acts void, because contrary to the Constitution." *The Federalist*, No. 78 (Alexander Hamilton). However, this power is limited to cases where the legislative enactment truly contradicts the Constitution—the judiciary may not abrogate the legislative power as a policy making governmental entity.

[34] *See, e.g.*, Nathaniel Chipman, *Sketches of the Principles of Government* 120-27 (1793) (finding that while the federal judiciary and executive may present objections to laws proposed by the legislature, separation of powers requires that "the legislature must be the sole judges, whether the [objections of the judiciary and executive] given coincides with the general

— *continued* —

The founders' view that the policy making power should be vested in the legislature, rather than the judiciary, is recognized as well-settled law by the federal judiciary. Starting as far back as the famous case of *Marbury v. Madison*, this Court, even while establishing once and for all that the federal judiciary had the power to review Congress' acts for compliance with the Constitution, recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law *is*" not what the law *should be*. *Marbury v. Madison*, 5 U.S. 137 (1803) (emphasis added). Since *Marbury*, this Court has frequently reiterated the legal rule that the federal judiciary is not "to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Rather, "'[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Id.* at 314 (quoting *Vance v. Bradley*, 440 U.S. 93 (1979)). This Court recognized the importance of the founders' belief that "a legislative choice is not subject to courtroom fact-finding." *Id.* at 313. The Court has further emphasized the importance of leaving policy decisions to legislatures "where the legislature must necessarily engage in a process of line-drawing." *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166,

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interest of the community, and the principles of the government, or is dictated by particular views, or particular interests.")

179 (1980). If science has yet to reach the stage where such a question can be determined on the basis of medical tests, then undeniably, the decision to set the age limit, if any, at which a person no longer is constitutionally capable of receiving a term of life imprisonment without the possibility of parole is a decision which requires line-drawing.

A moment's consideration reveals the wisdom of leaving questions of policy to the legislative branches of our federal and state governments. First, legislatures are better equipped to weigh conflicting scientific evidence and propositions relevant to proposed statutory enactments. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 786-87 (1997) (Souter, J. concurring) (finding that legislatures "have more flexible mechanisms for factfinding than the Judiciary").

Second, legislatures are better able to experiment with the law in order to perfect it. *Id.* (emphasis added) "Not only do [legislatures] have more flexible mechanisms for factfinding than the Judiciary, *but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions*". In contrast, once the federal judiciary enacts a constitutional rule, it is difficult to modify that rule despite subsequent developments in science, law, or policy. *See, e.g., Glucksberg*, 521 U.S. at 720 ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."). Hence, this Court has wisely adopted the rule that, if possible, the court will refrain from declaring a law unconstitutional. *See,*

e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (quoting *McGowan v. Maryland*, 366 U.S. 420 (1961) ("legislatures are presumed to have acted within their constitutional power"). The rule is particularly pertinent where, as in the case before the Court, the constitutionality of the law may depend upon a disputed science. This Court should neither be hasty to limit the state legislature's ability to experiment with the law nor risk creating a rift between developing science and law by establishing a permanent constitutional rule based on questioned science.

CONCLUSION

The scientific positions regarding adolescent brain development are in dispute. State legislatures should be free, therefore, to choose their own policy on whether to permit convicted adolescents to be sentenced to life imprisonment without the possibility of parole. State legislatures' policy-making powers allow them either to root this decision in either side of the disputed science regarding adolescent brain development or, alternatively, to reject both scientific positions as unsatisfactory and root their decisions on the basis of other policy interests. The point, however, is that—since no scientific principle definitively determines

whether or not such sentencing is constitutional—state legislatures are best suited to make the choice and should be left with the ability to do so.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF AMICUS CURIAE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT .....

I. AN EXAMINATION OF THE TEXT AND HISTORY OF THE EIGHTH AMENDMENT INDICATES THAT THE "CRUEL AND UNUSUAL PUNISHMENTS" CLAUSE WAS ORIGINALLY INTENDED TO PROHIBIT DISPROPORTIONATE CRIMINAL SENTENCES. 6

A. The Language and Source of the Eighth Amendment Prohibit All Forms of Disproportionate Punishment. 6

B. Evidence from the Ratification of the Bill of Rights Demonstrates the Existence of a Proportionality Requirement. 7

Contents

Page

II. EIGHTH AMENDMENT PROPORTIONALITY REVIEW IS NECESSARY TO PROTECT THE RIGHTS OF THE ACCUSED AND THE CONVICTED IN THE FACE OF EXPANDING CRIMINAL LAWS AND SENTENCES THAT CONCENTRATE CONTROL OVER SENTENCING IN THE HANDS OF PROSECUTORS. 18

A. Criminal Law and Sentences Have Expanded Dramatically in Recent Decades. 18

B. Only the Judiciary, not the Political Process, Can Provide a Counter-Weight to Disproportionate Sentences. 21

C. Control Over Sentencing Has Been Concentrated in the Hands of Prosecutors, Allowing Them to Threaten Disproportionate Prison Sentences and To Pressure Defendants into Waiving their Right to a Trial. 23

Contents

Page

III. THE COURT'S PRACTICE OF APPLYING A ROBUST PROPORTIONALITY REVIEW IN THE CAPITAL CONTEXT WHILE VIRTUALLY ELIMINATING PROPORTIONALITY REVIEW IN THE NONCAPITAL CONTEXT CANNOT BE JUSTIFIED. 27

A. Neither the Text of the Eighth Amendment nor the Differences Between Death and Other Forms of Punishment Justify the Court's Divergent Application of the Proportionality Principle in Capital and Noncapital Cases. 28

B. The Purported Difficulties in Administering a Proportionality Review for Noncapital Sentences Are Present in Many Other Areas of the Law in which the Court Routinely Applies Some Form of Proportionality Review. 31

CONCLUSION 38

TABLE OF CITED AUTHORITIES

Page

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 27

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BMW of North America, Inc. v. Gore,
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458 U.S. 782 (1982) 27, 33

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128 S. Ct. 2641 (2008) 27

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538 U.S. 63 (2003) 3

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481 U.S. 279 (1987) 27

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Page

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Page

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515 U.S. 646 (1995) 36

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U.S. CONST. amend. VII 6

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Page

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BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Center on the Administration of Criminal Law ("the Center") is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy.

The Center's litigation component aims to use its empirical research and experience with criminal justice and prosecution practices to assist in important criminal justice cases in state and federal courts throughout the United States. The Center's litigation program focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues. Because the misuse of prosecutorial discretion can and has resulted in the imposition of cruel and unusual punishments, the Center participates in cases to encourage the judiciary to check prosecutors by performing its constitutionally mandated task of enforcing the Eighth Amendment. The Center's Faculty Director is a nationally-recognized expert on

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution intended to fund its preparation or submission. The respondent has filed a blanket waiver in both cases. The petitioners have consented to the filing of this brief and such consent is being lodged herewith.

sentencing and criminal law, and the Center's Executive Director is a former federal prosecutor who worked for 12 years in the United States Attorneys' Offices for the Southern District of New York and the District of Columbia and in the United States Department of Justice.

The Center files this amicus brief out of concern that the absence of meaningful substantive review of noncapital sentences, the continued proliferation nationwide of excessively harsh and often mandatory sentences, and the fact that virtually all criminal cases are resolved by plea and not by trial have created significant imbalances in the criminal justice system. These imbalances, combined with the concentration of power in the hands of prosecutors, pose barriers to the fair administration of criminal justice. The Center respectfully submits that this Court should hold that the sentences imposed in these cases are unconstitutionally excessive and invigorate substantive review of noncapital sentences in order to fulfill the mandate of the Eighth Amendment and restore rationality and proportionality to the criminal justice system in the United States.

SUMMARY OF THE ARGUMENT

This Court first held that the Eighth Amendment prohibits disproportionate noncapital sentences nearly a hundred years ago in *Weems v. United States*, 217 U.S. 349 (1910). The Court strongly reaffirmed this principle in the majority opinion of *Solem v. Helm* when it held that "[t]he common-law principle [of proportionality] incorporated into the Eighth Amendment clearly applied to prison terms." 463 U.S. 277, 289 (1983). Since then,

the Court has consistently recognized the Eighth Amendment prohibition on disproportionate sentences.[2]

Although some members of the Court suggested, in *Ewing*, that a prison term can never violate the Eighth Amendment, *Ewing* 538 U.S. 11 at 21-22, 28-30 (2003), the elimination of proportionality review in the noncapital context would be inconsistent with the Eighth Amendment's text and original meaning, the Amendment's text prohibits excessive bail or fines, as well as cruel and unusual punishments. There has been a debate within the Court and among scholars concerning the original meaning of the Eighth Amendment. However, drawing on English and early American legal history, this Court has held that the Amendment was intended to prohibit *all* punishments – including terms of incarceration – that are unwarranted by the nature of the offense committed or the character of the offender. *See Weems v. United States*, 217 U.S. 349, 366-81 (1910); *Solem v. Helm*, 463 U.S. 277, 284-90 (1983); *see also Rummel v. Estelle*, 445 U.S. 263, 287-88 (1980) (Powell, J. dissenting). A close examination of the text and history of the Amendment supports this conclusion.

Now more than ever, citizens need the protection of the Eighth Amendment. In the past few decades, both major political parties have aggressively sought the label of "tough on crime." The result has been a proliferation of new criminal laws, many of which are written so broadly that they cover cases that were not within the

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[2] *See Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

intent of the legislature.[3] In addition to dramatically expanding the scope of behavior covered by criminal law, legislators have adopted increasingly harsher punishments. They have done so through a variety of mechanisms, including mandatory minimums and three-strikes laws that shift control over sentencing away from the judiciary and to prosecutors who determine who gets these sentences through their charging decisions. Judicial control over sentencing is further reduced because these broad and harsh laws give prosecutors the ability to leverage defendants into guilty pleas. In fact, many laws include punishments that no one thinks are appropriate in many of the cases to which they apply. Instead, these laws often contain inflated punishments that are included to create leverage for prosecutors to secure guilty pleas and cooperation. Enforcing the Eighth Amendment prohibition against disproportionate sentences would provide needed protection in those cases where laws are inappropriately applied and yield sentences in excess of what is proportionate to the crime committed or to the particular offender's culpability.

There is already an existing model for this kind of enforcement of the Eighth Amendment. The Court has

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[3] *See* JOHN S. BAKER JR., FEDERALIST SOC'Y FOR LAW & PUB. POL'Y, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 12 (2004); JAMES STRAZELLA ET AL., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW, 7 (1998); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 724 (2005); John C. Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 19 (1983).

consistently applied a robust proportionality principle in the context of capital sentencing. There is no good reason to confine a vigorous application of the Eighth Amendment to capital cases. The text of the Eighth Amendment certainly does not distinguish between capital punishments and other forms of punishment. The Court has often emphasized the differences between the death penalty and other forms of punishment, but the only real difference is that death is a more severe punishment. This difference does not justify providing Eighth Amendment protections to defendants in capital cases while denying them to all others.

The Court has also pointed to potential difficulties in administering a proportionality review in noncapital cases as a reason for its unwillingness to apply a proportionality principle to noncapital sentences. However, in many other contexts – including cases involving fines, punitive damages, and capital punishment – the court has often applied proportionality tests that are no easier to administer than a proportionality test that covers terms of incarceration. There is no justification for singling out incarceration as the only type of punishment that escapes judicial review.

Because application of a proportionality principle to noncapital sentences is mandated by the text and original meaning of the Eighth Amendment, the Court, in the present case, should return to the robust proportionality review it adopted in *Solem v. Helm*.

ARGUMENT

I. AN EXAMINATION OF THE TEXT AND HISTORY OF THE EIGHTH AMENDMENT INDICATES THAT THE "CRUEL AND UNUSUAL PUNISHMENTS" CLAUSE WAS ORIGINALLY INTENDED TO PROHIBIT DISPROPORTIONATE CRIMINAL SENTENCES.

The text of the "Cruel and Unusual Punishments" Clause of the Eighth Amendment prohibits all forms of disproportionate punishment, including terms of imprisonment. And the enactment history of the Clause – which comes directly from the English Bill of Rights – strongly supports the view that its ban on cruel and unusual punishment was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense at hand.

A. The Language and Source of the Eighth Amendment Prohibit All Forms of Disproportionate Punishment.

The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VII. The prohibitions on "excessive bail" and "excessive fines" mandate a proportionality review.[4] The prohibition on "cruel and unusual punishments" is *in pari materia*[5] with the bail and fines clauses and thus

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[4] *See, e.g., Stack v. Boyle*, 342 U.S. 1, 5 (1951); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

[5] *Osborn* v. *Haley*, 549 U.S. 225, 263 (2007).

also mandates proportionality review. Indeed, the Court has recognized that the Eighth Amendment imposes "'parallel [proportionality] limitations' on bail, fines, and other punishments." *Solem v. Helm*, 463 U.S. 277, 289 (1983) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)).

This interpretation also comports with the commonly understood meanings of "cruel" and "unusual" at the time of the Framing. The word "cruel" was often used as a synonym for severe or excessive.[6] The word "unusual" was used interchangeably with the word "illegal."[7] Illegality in this context meant legal practices contrary to "long usage," or innovations outside of established common or customary law.[8] During the colonial period, common law often operated as a legal minimum, similar to *jus cogens* in international law, preventing legislation from violating longstanding, customary legal principles.[9] Legislation that violated established common law principles was considered

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[6] *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 16-17 (1769) (describing punishments of "unreasonable severity" Blackstone uses the word "cruel" as a synonym for severe or excessive); *see also* OXFORD ENGLISH DICTIONARY ONLINE "cruel" (2d ed. 1989) (hereinafter "OED") (citing a 1710 definition of cruel as "severe, hard"), www.oed.com.

[7] *Harmelin v. Michigan*, 501 U.S. 957, 970-74 (1991).

[8] *See generally* John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. L. REV. 1739 (2008).

[9] *See id.* at 1765.

"unusual" in this sense, and thus void.[10] This concept was at the heart of the American Revolution. Colonists claimed legal justification for independence from Parliament's repeated violation of common law rights to representation and trial by jury, the same rights memorialized in the Constitution.[11] Thus, to the extent that "unusual" is synonymous with "illegal," the illegality referred to was the violation of longstanding common law norms, not the lack of statutory authorization. Thus, interpreting the terms together, the "cruel and unusual punishments" prohibited by the Bill of Rights were severe or excessive punishments that broke from longstanding, inviolable common law tradition.

The common law prohibition "against excessive punishment," in any form, originated with the Magna Carta.[12] Historical evidence suggests that the common law proportionality principle was codified in the English Bill of Rights in response to the disproportionate punishment of Titus Oates.[13] A dissent accompanying the rejection of Oates' appeal stated that "there is no precedent to warrant the punishment of whipping and

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[10] *See id.* at 1795 (citing objections to Parliament's actions as "unusual" and "void" because contrary to "common right or reason").

[11] *Id.* at 1794-96.

[12] Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted":* The Original Meaning, 57 CAL. L. REV. 839, 845 (1969); *see also* MAGNA CARTA ch. 20-22 (1215) (describing regulations on excessive and oppressive punishment through fines).

[13] *See id.* at 852-860.

committing to prison for life *for the crime of perjury*."[14] Thus, in the context of the Oates case, "cruel and unusual" referred to the severity of the punishment in relation to the crime, not to the method of punishment. Therefore, the meaning of the English Bill of Rights provision on which the Eighth Amendment was modeled supports its application to excessive sentences of imprisonment.

B. Evidence from the Ratification of the Bill of Rights Demonstrates the Existence of a Proportionality Requirement.

The history of the Constitution's ratification, including debate notes from both the Virginia Convention and the First Congress, demonstrate that the Eighth Amendment includes a proportionality requirement. Although the historical record contains few specific references to the "Cruel and Unusual Punishments" Clause, disagreements between Federalists and Anti-Federalists concerning the need for a Bill of Rights offer insight into the abuses that the Amendments, including the Eighth Amendment, aimed to prevent. Additionally, the ratification debate in the First Congress illuminates the Members' understanding of the language of the Amendment. Examined in context, both show that the "Cruel and Unusual Punishments" Clause includes a proportionality requirement analogous to English common law.

The best evidence of why state legislatures decided to demand the Amendment comes from

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[14] *Harmelin v. Michigan*, 501 U.S. 957, 971 (1991) (Scalia, J.).

transcripts of the Virginia ratification convention.[15] Anti-Federalist resistance to ratification of the Constitution stemmed largely from concerns over the new federal government's potential for abuse of common law civil rights.[16] Patrick Henry and George Mason led the Anti-Federalist attack on ratification, going through the Constitution line-by-line and arguing that it gave the federal government powers unknown at common law that would lead to "new and unusual experiments in government."[17] Henry focused on several instances of federal government power to institute "unusual punishments," including the danger of using the treaty and militia power for law enforcement purposes.[18] Most importantly, Anti-Federalists highlighted the danger of the federal government's criminal prosecutorial power due to a lack of either common law limitations or a bill of rights.[19] Henry's argument for the addition of the Bill of Rights and specifically the Eighth Amendment hinged on protecting citizens from both harsh punishments and disproportionate sentences:

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[15] Stinneford, *supra* note 8, at 1803-10.

[16] *Id.* at 1803.

[17] PATRICK HENRY, SPEECH TO THE VIRGINIA RATIFYING CONVENTION FOR THE UNITED STATES CONSTITUTION (June 9, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, 1787, at 172 (Jonathan Elliot ed., 2d ed. 1881) (hereafter "Elliot's Debates").

[18] Stinneford, *supra* note 8, at 1804-1806.

[19] 3 Elliot's Debates, at 447.

> In this business of legislation, your members of Congress will loose [sic] the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, *or* cruel and barbarous punishment. But Congress *may introduce the practice of the civil law, in preference to that of the common law.* They may introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a *criminal equity*, and extort confession by torture, *in order to punish with still more relentless severity.*[20]

Henry's speech supports proportionality as part of the "Cruel and Unusual Punishments" Clause in two ways. First, the passage supports the view that the Framers meant the Eighth Amendment to preserve common law protections associated with law enforcement. Second, the passage references not only limiting *types* of punishment, but also controlling the *severity* of that punishment.

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[20] *Id.* at 447-48 (emphases added).

Henry and the other Anti-Federalists feared that supplanting common law protections of individual liberties with legislation would lead the government to adopt extreme punishments.[21] Henry saw civil law systems, like France and Germany, and common law systems with parliamentary superiority, like Great Britain, as punishing unreasonably and with "relentless severity."[22] Based on that fear, Henry stressed the need to prevent Congress from disregarding the common law protections that ensured fair trial procedures and the reasonable punishment of criminals.[23]

Henry therefore advocated on behalf of the "Cruel and Unusual Punishments" Clause, and in doing so, he emphasized both the type and severity of punishments. He spoke of the need to disallow "tortures, *or* cruel and barbarous punishment." Speaking of "tortures" *or* "cruel and barbarous punishments" in the disjunctive makes clear they are two separate issues. Tortures were those punishments causing extreme physical or mental pain. "Cruel and barbarous punishments," in contrast, were inflictions of overly severe sentences.[24] Henry argued that failing to codify common law protections through a Bill of Rights would leave citizens susceptible to both.

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[21] Stinneford, *supra* note 8, at 1807.

[22] *Id.* (citing 3 Elliot's Debates, at 448).

[23] *Id.*

[24] *See* OED, *supra* note 6 (defining "torture" as "causing physical or mental suffering" and defining "barbarous" as "uncivilized" or "cruelly harsh").

Henry's support of proportionality is further evidenced by his fear of establishing an American institution of "criminal equity."[25] This statement references the Star Chamber, a court in England that could punish arbitrarily and severely without common law limitations.[26] The Framers knew the abuses of the Star Chamber through both history and reputation: trials were closed, conducted without juries, and no appeals were available.[27] Notably, the problem with Star Chamber punishments was not the *method* of those punishments; the abuses came from the sentences' arbitrary and disproportionate *severity*.[28] The Star Chamber tried only misdemeanors but punishments included heavy fines, mutilation, perpetual imprisonment, or some combination of these.[29] When Henry's speech at the Virginia Convention denounced the possibility of federal courts of "criminal equity," his fear was not only the type of punishments inflicted, but also arbitrary punishment of minor crimes through disproportionate sentences, including perpetual imprisonment.[30] The "criminal equity" of the Star Chamber,

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[25] Elliot's Debates, at 448.

[26] *See Faretta v. California*, 422 U.S. 806, 821 n. 18 (1975) (discussing the case of William Prynne, whose Star Chamber libel conviction led to the "monstrous" sentence of legal disbarment, deprivation of his university degrees, pillorying, cutting off ears, perpetual imprisonment without pen or paper, and a fine).

[27] *Id.* at 821.

[28] *Id.*

[29] Thomas G. Barnes, *Star Chamber Mythology*, 5 Am. J. Legal Hist. 1, 4, 7 (1961).

[30] Elliot's Debates, at 448.

with its harsh punishment of misdemeanors, epitomized the "relentless severity" that Henry hoped the Eighth Amendment would curtail.[31]

Henry, Mason, and other Anti-Federalists argued so strongly against ratification that the Federalists compromised, agreeing to recommend a bill of rights along with ratification.[32] Immediately after ratification, a committee was formed, including Henry and Mason, to draft proposed amendments to the Constitution.[33] The Committee proposed amendments that included almost the entire contents of the Virginia Declaration, including the "Cruel and Unusual Punishments" Clause.[34] Other states followed Virginia's lead, each recommending a bill of rights without debate.[35] Congress discussed the Eighth Amendment only briefly before ratification, but the available evidence suggests a broad consensus that the Amendment was designed to codify the prohibition on harsh and disproportionate punishment.

The debate over the Bill of Rights focused only momentarily on the "Cruel and Unusual Punishments" Clause.[36] Only two members of Congress, Representatives Livermore and Smith, made remarks on the Amendment

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[31] *Id.*

[32] Stinneford, *supra* note 8, at 1807-08.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1808.

[36] *Id.* at 1809.

and only one of these was substantive.[37] Livermore stated that the Clause "seems to have no meaning in it" and questioned whether a ban on "cruel" punishments would prevent the Congress from passing harsh sentences, commenting that "villains often deserve whipping, and perhaps to have their ears cut off."[38] Smith simply made a brief objection, arguing that the Clause was too "indefinite."[39] After Smith's comment, the Amendment passed by an overwhelming margin and without further debate or modification.[40] Although the remarks of Smith and Livermore are the only remarks concerning the Eighth Amendment from the congressional debate that are available, because both were opponents of the Eighth Amendment[41] their statements should be given little interpretive weight.[42]

Far more informative are the views of some of the most influential Founders who were strong advocates of proportionality.[43] Thomas Jefferson authored and

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[37] *Id.*

[38] *Furman v. Georgia*, 408 U.S. 238, 262 (1972) (Brennan, J., concurring) (quoting 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

[39] *Id.* at 244.

[40] Stinneford, *supra* note 8, at 1810.

[41] *See Weems v. United States*, 217 U.S. 349, 368-69 (1910).

[42] *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976).

[43] *See* Debora Schwartz and Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 818-19, 822 (1974).

introduced to the Virginia Legislature, "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital."[44] This bill limited capital punishment to a few heinous offenses and established a scale of penalties, carefully proportioned to the offense.[45] Like Jefferson, Benjamin Franklin also believed strongly in proportionality.[46] In a letter to Benjamin Vaughan, Franklin objected to what he viewed as disproportionate punishments contained in English law.[47] He said, "[t]o put a man to Death for an Offense which does not deserve Death, is it not Murder?"[48] In light of their strong support of proportionality, Jefferson and Franklin must have believed that the Eighth Amendment protected against disproportionate punishment – as Henry said it would. Otherwise, neither would have refrained from speaking upon the Amendment's passage in the face of Livermore's and Smith's comments.

Further support for this reading comes from the fact that, upon the Amendment's enactment, the Congress crafted penal laws that adhered to and reflected the Clause's commitment to proportionality. The United States' first criminal code included only four capital crimes: murder, treason, forgery of U.S. securities, and

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[44] *Id.* at 818.

[46] *Id.*

[45] *Id.* at 822.

[47] *Id.*

[48] *Id.*

piracy.[49] Although the death sentence for forgery of U.S. securities or piracy may seem extreme today, the proportionality principle is apparent when one examines the code in its entirety. Piracy was punishable by death, but confederacy with a pirate was only punishable by up to three years imprisonment.[50] Similarly, the code prescribed death for treason but a maximum of seven years for failing to inform authorities of the treason of another.[51] Sentences for crimes as serious as maiming someone on federal property, manslaughter on federal property, perjury and altering judicial records ranged from three to seven years in prison.[52] A large scale theft committed in the course of piracy was punishable by death, but simple theft of federal property did not even carry a prison sentence: offenders received a fine and up to thirty-nine lashes.[53] Compared to the "Bloody Code" of England, which sentenced defendants to death for even the smallest offense, the United States code

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[49] Tom Stacey, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY B. OF RTS. J. 475, 517-18 & n.234 (2005) (noting that theft of goods or a ship was only punishable by death if linked to mutiny or piracy, an act that "was the eighteenth century's terrorism.").

[50] *Id.* at 518 n.235 (citing Act of Apr. 30 1790, ch. 9 §§ 8, 12, 1 Stat. 112, 113-15 (1845)).

[51] *Id.* (citing Act of Apr. 30 1790, ch. 9 §§ 1-2, 1 Stat. 112 (1845)).

[52] *Id.* (citing Act of Apr. 30 1790, ch. 9 §§ 3,7,13, 15, 18, 22, 1 Stat. 112, 113,115-117 (1845)).

[53] *Id.* (citing § Act of Apr. 30 1790, ch. 9 § 8, 16, 1 Stat. 112, 113-14, 116 (1845)).

was reasonable and proportional.[54] The First Congress, in limiting the death penalty to four crimes and making the others punishable by reasonable prison terms, thus acted consistently with the prevailing view of the time that punishments should be proportionate. And that same view is reflected in the text of the Eighth Amendment.

II. EIGHTH AMENDMENT PROPORTIONALITY REVIEW IS NECESSARY TO PROTECT THE RIGHTS OF THE ACCUSED AND THE CONVICTED IN THE FACE OF EXPANDING CRIMINAL LAWS AND SENTENCES THAT CONCENTRATE CONTROL OVER SENTENCING IN THE HANDS OF PROSECUTORS.

A. Criminal Law and Sentences Have Expanded Dramatically in Recent Decades.

The past few decades have seen a dramatic expansion in criminal laws and the harshness of the punishment associated with those laws. There are more than 4,000 criminal offenses in the United States Code.[55] State codes are somewhat narrower, but not much.[56]

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[54] *See* RANDALL MCGOWAN, LAW, CRIME, AND ENGLISH SOCIETY, 1660-1830, 117-21 (2002) (describing the development of the English penal code that by 1819 made 223 crimes punishable by death).

[55] *See* JOHN S. BAKER JR., FEDERALIST SOC'Y FOR LAW & PUB. POL'Y, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 12 (2004).

[56] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507, 516-517 (2001).

Judge Kozinski has observed that criminal law has expanded to the point that virtually every American could be considered a criminal.[57] As a result of this expansion in criminal law, state and federal codes are filled with overlapping crimes. This allows individuals to be charged with numerous offenses for a single act, thereby increasing the potential prison sentence for any given act.[58]

Prison sentences have also been increased through more direct action. Mandatory minimums and three-strikes laws have been particularly popular. By 1994, every state and the District of Columbia had enacted some version of a mandatory minimum sentencing law.[59] There are now at least 171 mandatory minimum provisions in federal criminal statutes, affecting roughly 10 percent of the federal prison population.[60] The federal government and over half the states have passed three-strikes laws.[61]

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[57] Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 43-44 (Timothy Lynch ed., 2009).

[58] *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517-18 (2001).

[59] Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 27 (2007).

[60] Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security 2 (June 26, 2007), *reprinted in* 19 FED. SENT. REPT. 335.

[61] 18 U.S.C. § 3559(c); Jennifer E. Walsh, Historical Guide to Controversial Issues in America, Three Strikes Laws xvi (2007); Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 27 (2007).

These trends have resulted in significantly longer prison sentences. In the period from 1984 to 1993, actual time spent in prison for narcotics offenses nearly tripled.[62] During the same period, sentences for violent crimes doubled while sentences for firearms offenses nearly tripled.[63] The average prison sentence imposed for all federal crimes more than doubled from 1984 to 2002.[64] In the extreme, mandatory minimums and three-strikes laws have resulted in defendants receiving sentences as severe as 25 years to life for offenses as minor as stealing a piece of pizza or breaking into a church to steal bread.[65]

The increased scope and harshness of criminal laws has contributed to a tripling of the percentage of Americans in prison over the last three decades.[66] The

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[62] PAUL J. HOFER & COURTNEY SEMISCH, EXAMINING CHANGES IN FEDERAL SENTENCING SEVERITY: 1980-1998, 2 FED. SENT. REP. 12 (1999) at 14-16.

[63] *Id.*

[64] *Excerpts from Principles for the Sentencing Systems: A Background Report*, 18 Fed. Sent. R. 207 (2006) (*citing* U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30, fig. D; U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 378 (1991)).

[65] *See* Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995, at B3; Martha Bellisle, *Man Gets 25 Years to Life for Alleged Food Heist*, L.A. TIMES, Jul. 18, 1999, at A1.

[66] See, e.g., JAMES Q. WHITMAN, HARSH JUSTICE 70-74 (2003); SARAH LAWRENCE ET AL., URBAN INST. JUST. POLICY CENTER, THE PRACTICE AND PROMISE OF PRISON PROGRAMMING 2 (2002).

United States incarcerates nearly seven times more people per capita than Europe[67] and has the harshest prison sentences of any Western democracy.[68] In short, as Justice Kennedy has said, "Our resources are misspent, our punishments are too severe, our sentences too long."[69]

B. Only the Judiciary, not the Political Process, Can Provide a Counterweight to Disproportionate Sentences.

Only the Judiciary, via proportionality review, can provide a counterweight to disproportionate sentences. The legislative process plays no such role. Legislators have little incentive to account for the interests of criminal offenders. Offenders yet to be caught are obviously unlikely to identify themselves in order to lobby for narrower criminal definitions or shorter prison sentences. Those already convicted of a crime are an even weaker political group. In many states, felons are disabled from voting.[70] In addition, the stigma of criminal

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[67] *RECENT CASE: Civil Disobedience - The Role of Judges - Ninth Circuit Affirms Mandatory Sentence. - United States v. Hungerford, 465 F.3d 1113 (9th Cir. 2006)*, 120 Harv. L. Rev. 1988, 1993 n.35 (citing Bruce Western & Becky Pettit, *Mass Imprisonment, in* PUNISHMENT AND INEQUALITY IN AMERICA 14-15 & fig.1.2. (2006).

[68] *See* JAMES Q. WHITMAN, HARSH JUSTICE 57-58 (2003).

[69] Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003), *available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.*

[70] Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 255-56 (2005).

conviction prevents criminals from forming interest groups or from partnering with other coalitions to influence political outcomes.[71] In contrast, there are various powerful groups in favor of broader and harsher criminal laws, including prosecutors, companies involved in running prisons, prison employee unions, and victims' rights groups.[72]

Significantly, the sentences that emerge from this legislative process are often harsher when applied to individual cases than legislators, the public, and even prosecutors would desire when they support these general laws. Prosecutors lobby for punishments that will give them leverage to induce guilty pleas and cooperation,[73] instead of supporting those tailored to achieve fair results in each individual case. Politicians

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[71] *See* Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL OF RTS. J. 475, 527 (2005).

[72] Rachel Barkow, *Separation of Powers and Criminal Law*, 58 STAN. L. REV. 1021, 1029 (2006).

[73] *See, e.g., Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 16-33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia); *Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 102 (2002) (statement of James B. Comey, Jr., U.S. Attorney, Southern District of New York); *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government Reform*, 106th Cong. 144-53 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Dep't of Justice).

typically design laws to apply to the worst offenders (often those that have been the subject of media attention), rather than to all cases to which the sentence will apply.[74] As a result, sentences in individual cases are often greater than necessary and far exceed the length of sentence the electorate would actually want under the circumstances. Indeed, empirical studies demonstrate that sentences imposed often exceed the public's expectations and sense of fairness.[75] For example, one study found that, although a majority of Ohio respondents supported a three-strikes law, only a small minority believed that the life sentence required by the law was appropriate when faced with specific factual situations.[76] It is up to judges enforcing the Eighth Amendment to correct these failings.

C. Control Over Sentencing Has Been Concentrated in the Hands of Prosecutors, Allowing Them to Threaten Disproportionate Prison Sentences and To Pressure Defendants into Waiving their Right to a Trial.

The dramatic expansion of criminal law and the increased severity of penalties have shifted control over sentencing away from judges and to prosecutors. This

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[74] *See* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 107 (1999).

[75] *See* Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 101, 122, 150, 152 (1992).

[76] Brandon K. Appelgate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes*, 42 CRIME & DELINQ. 517, 528-30 (1996).

Court has held that a prosecutor's decisions regarding charging and plea bargaining are almost entirely discretionary.[77] For example, the Court upheld a prosecutor's decision to offer the defendant a sentence of five years in prison if he pleaded guilty but to seek a sentence of life imprisonment pursuant to a recidivist statute if the defendant chose to go to trial. *Bordenkircher v. Hayes*, 434 U.S. 357, 358-359 (1978). Armed with mandatory minimums, three-strikes laws and overlapping criminal statutes, prosecutors are free to threaten much more severe prison sentences than they were just a few decades ago.[78]

Prosecutors can use these overlapping laws and mandatory minimums to threaten defendants with extreme sentences and pressure them into plea bargains, essentially removing judges from the sentencing process.[79] Indeed, the prospect of a long

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[77] *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (courts are "properly hesitant to examine the decision whether to prosecute").

[78] *See* Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 104-05 (2003).

[79] *See, e.g.*, Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 CATO POL'Y ANALYSIS 1, 9-10, 17 (2002); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 (2001).

sentence would likely pressure even an innocent defendant into accepting a plea bargain to avoid the risk of much longer sentence after a trial.[80]

Recent statistics indicate that prosecutors are using this increased power. The percentage of defendants pleading guilty has risen substantially over the past few decades as potential prison sentences have increased.[81] The most recent figures from the U.S. Sentencing Commission indicate that over 96% of federal cases end in guilty pleas and that in some districts, the rate exceeds 99%.[82]

The small number of defendants that do risk trial often cannot rely on judicial discretion to avoid grossly

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[80] A recent study by Professor Ronald Wright argues that the data indicate that defendants are likely abandoning meritorious trial defenses because of the steep sentencing discount they receive for pleading guilty. *See generally* Ronald F. Wright, Trial Distortion and the End of Innocence in Federal Criminal Justice, 154 U. Pa. L. Rev. 79 (2005). *See also* C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. 15, 17 (Spring 2003).

[81] In 2007 the percentage of defendants in U.S. district courts pleading guilty or nolo contendere, excluding those cases that were dismissed, was approximately 95.7%. In 1977, only about 81.7% of such defendants plead guilty or nolo contendere. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 5.22, *available at http://www.albany.edu/sourcebook/pdf/t5222007.pdf*.

[82] U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.10, *available at http://www.ussc.gov/ANNRPT/2008/Table10.pdf*.

disproportionate sentences. Mandatory sentences designed primarily to encourage pleas, but not to apply to individual cases after trial, force judges to impose sentences they believe are "unjust, cruel and irrational."[83] By giving prosecutors the tools to threaten extreme prison sentences and tying the hands of judges in the few cases that do go to trial, legislators have concentrated power in prosecutors and made judges far less relevant in determining sentences. Prosecutors could seek fairer, more proportionate sentences for those defendants that choose to go to trial rather than advocating for the harsher sentences designed to induce guilty pleas. But this possibility is more theoretical than real. If prosecutors threaten long sentences in plea negotiations and then seek shorter sentences at trial, the threat of the longer sentence would lose credibility as a bargaining technique. Thus, if prosecutors threaten defendants with sentences that even they believe are too lengthy in an effort to secure a plea with a sentence they think is appropriate, they will not later be in a position to seek a shorter, more appropriate sentence after trial. They have to live up to their threats if they want to maintain their institutional credibility. As a result, for the small percentage of defendants who do

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[83] *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (Cassell, J.); *see also* Anthony M. Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9, 1994) (mandatory minimums are "imprudent, unwise and often an unjust mechanism for sentencing"); *Harris v. United States*, 536 U.S. 545, 570 (2002) (J. Breyer concurring) ("Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system...").

not agree to the bargains, the sentences actually imposed are often cruel and unusual.

III. THE COURT'S PRACTICE OF APPLYING A ROBUST PROPORTIONALITY REVIEW IN THE CAPITAL CONTEXT WHILE VIRTUALLY ELIMINATING PROPORTIONALITY REVIEW IN THE NONCAPITAL CONTEXT CANNOT BE JUSTIFIED.

The Court has recognized that "[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties." *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987). Nonetheless, the Court has applied the Eighth Amendment very differently in the capital and noncapital contexts. In the capital context, the Court's proportionality review is robust: unlike in the noncapital context, the Court has not dismissed challenges to capital sentences merely because a sentence would promote a penological goal.[84] This robust review of capital sentences has led the Court to exempt certain offenses and certain offenders from the death penalty.[85] Although the same exemptions might

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[84] *See, e.g., Coker v. Georgia*, 433 U.S. 584, 592 (1977). Of course, the death penalty always serves the goal of incapacitation, which the Court has pointed to as a penological goal justifying harsh noncapital sentences. *Ewing v. California*, 538 U.S. 11, 25 (2003).

[85] *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650-51 (2008); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986).

not necessarily apply to long prison sentences, applying such a cursory and deferential proportionality review in noncapital cases while applying a robust proportionality review in capital cases cannot be squared with Eighth Amendment.

The Eighth Amendment does not distinguish between capital and noncapital punishments; it prohibits all "cruel and unusual punishments." It is therefore not surprising that the Court has not attempted to justify treating capital cases differently based on the text of the Eighth Amendment. Rather, the Court has relied on a variety of functional arguments to justify its divergent application of the Eighth Amendment. These arguments do not provide an adequate justification for affording capital defendants substantive Eighth Amendment protections while denying those protections to noncapital defendants.

A. Neither the Text of the Eighth Amendment nor the Differences Between Death and Other Forms of Punishment Justify the Court's Divergent Application of the Proportionality Principle in Capital and Noncapital Cases.

In establishing a robust proportionality review for capital cases, the Court has repeatedly distinguished the death penalty from other forms of punishment. The most thorough explanation of the Court's special concern with capital cases is provided by Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. at 286. However, none of the differences emphasized by Justice Brennan justify the Court's refusal to apply a robust proportionality review in noncapital cases.

Rather, these points demonstrate that Eighth Amendment oversight is necessary for both capital cases and terms of incarceration.

In *Furman*, Justice Brennan highlighted the difference in the pain associated with capital punishment and other punishments. He stated that death is "the only punishment that may involve the conscious infliction of physical pain." *Furman*, 408 U.S. at 287-88. Imposition of the death penalty certainly involves inflicting physical pain. However, imprisonment is typically also accompanied by a form of physical pain.[86] Prisoners regularly face violence while incarcerated.[87] In fact, it has been estimated that 70 percent of all inmates are assaulted by other inmates every year.[88]

In addition to the physical pain associated with capital punishment, Justice Brennan pointed to the "psychological torture" that accompanies the wait between the imposition of a death sentence and the infliction of death. *Furman*, 408 U.S. at 288. Again, there is no denying the extreme psychological pain associated with the death penalty. However, noncapital sentences are also accompanied by severe psychological trauma.[89]

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[86] *See e.g.*, Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 116-38 (2007).

[87] *Id.* at 123-27; HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 29-30, 42-43 (2001).

[88] *Racial Conflict*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 379 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

[89] *See e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1168-70 (2009).

A sentence of life without parole is particularly traumatic. John Stuart Mill described those subject to a life sentence as being in "a living tomb, there to linger out what may be a long life . . . without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope."[90] It is therefore not surprising that some individuals facing death sentences have waived their appeals, preferring death to a life sentence without parole.[91] Physical and mental pain are, therefore, hardly distinguishing characteristics of capital cases. They are emblematic of long terms of incarceration as well.

Justice Brennan also commented on the "awesome" nature of death, which "involves, by its very nature, a denial of the executed person's humanity." *Furman*, 408 U.S. at 290. He suggested that because of the degrading nature and enormity of the death penalty, it was more important to recognize robust Eighth Amendment rights in capital cases. However, the fact that Eighth Amendment protections are essential in the capital context does not mean that they should be nonexistent in the noncapital context. The right to a *Miranda* warning might be "far more important" for those facing capital charges than those suspected of a crime with a one-year punishment, yet everyone taken into police custody has the right to the same warning.

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[90] John Stuart Mill, *Parliamentary Debate on Capital Punishment Within Prisons Bill* (Apr. 21 1868), *reprinted in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 271 (Gertrude Ezorksy ed. 1972).

[91] Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 n.143 (1998).

Finally, Justice Brennan pointed to the "finality" of the death penalty to distinguish it from other penalties. *Furman*, 408 U.S. at 289-90. However, once a prison sentence has been served, it is no more reversible than a death sentence. It is true that with a prison sentence what is irreversibly lost is a portion of one's life rather than one's entire life, but this is a distinction based on severity, not finality.

In sum, the fact that death may be a more severe punishment does not lead to the conclusion that Eighth Amendment protections are unwarranted in noncapital cases. The severity of death may mean that it applies to fewer categories of cases and offenders, but it does not speak to the level of constitutional protection that defendants facing noncapital punishments deserve. The Eighth Amendment does speak to that issue – and it makes no distinction between capital and noncapital cases.

B. The Purported Difficulties in Administering a Proportionality Review for Noncapital Sentences Are Present in Many Other Areas of the Law in which the Court Routinely Applies Some Form of Proportionality Review.

The Court has often alluded to the potential administrative problems associated with extending a robust proportionality review to noncapital cases.[92]

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[92] *See e.g.*, *Ewing v. California*, 538 U.S. 11, 32 (2003) (Scalia, J. concurring); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (Kennedy, J. concurring).

These concerns are highlighted in *Harmelin v. Michigan*, 501 U.S. 957 (1991). A portion of the opinion supported only by Justice Scalia and Chief Justice Rehnquist describes the three-part test for determining proportionality proposed in *Solem* and explains why two of the factors cannot be easily applied.[93] The first of these factors is the inherent gravity of the crime. This factor is purportedly problematic because the gravity of an offense "depends entirely upon how odious and socially threatening one believes [it] to be." *Id.* at 988. The second factor is the comparison of sentences imposed on other offenders in the same jurisdiction. This factor, according to this part of the opinion, raises the same problem. "One cannot compare the sentences . . . if there is no objective standard of gravity." *Id.* The opinion goes on to suggest that even if there were an objective standard of gravity, comparing the sentences for these offenses would do little to shed light on the proportionality of a given sentence. *Id.* at 989. According to the opinion, "[p]roportionality is an inherently retributive concept" addressing the question of whether punishment is commensurate with the harm imposed by the offender." *Id.* However, because the other goals of punishment, such as deterrence and rehabilitation, can affect sentence length, comparing sentences might reveal relatively little about how much retribution is appropriate for a given crime. *Id.*

This line of argument is directly contradicted by the fact that the Court applies proportionality tests in other areas that raise the very issues discussed in *Harmelin*.

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[93] *Harmelin*, 501 U.S. at 985-94 (opinion of Scalia, J., joined by Rehnquist, C.J.).

As already noted, the Court has approved a proportionality test under the Eighth Amendment for punishments imposing death. Of course, "gravity" is no more objective in capital cases than in noncapital cases. Yet, in applying the proportionality principle in the capital context, the Court examines the gravity of the crime.[94] The Court also compares sentences imposed on other criminals in the same jurisdiction.[95] Thus, the Court finds value in such comparisons even where the relevant punishments may be furthering goals other than retribution. It is true that all crimes cannot be precisely ordered in terms of gravity and that penological goals other than retribution may affect prison sentences. However, this does not mean that when a jurisdiction imposes the same sentence for crimes that diverge widely in terms of gravity, such as shoplifting and rape, it sheds no light on the question of proportionality. It is not a purely objective inquiry to determine that death is a disproportionate punishment for rape or that death is a disproportionate punishment for a murder committed by a seventeen-year-old but not by an eighteen-year-old. These decisions necessarily involve some subjective judgment. However, they are based on evidence concerning society's sense of justice and broadly accepted principles concerning gravity, such as the principle that death is graver than other physical harms and the principle that juveniles are less culpable than adults.

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[94] *See e.g., id.* at 598; *Thompson v. Oklahoma*, 487 U. S. 815, 835 (1988); *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

[95] *See e.g., Enmund*, 458 U.S. at 795.

The Court has also applied proportionality review in cases involving fines. According to the Court, "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Gravity is no less subjective when the potential penalty is a fine instead of a prison sentence. Nonetheless, in *Bajakajian*, the Court held that gravity can be measured by harm and culpability and that the punishment was disproportionate for a "crime [that] was solely a reporting offense," involving no physical or monetary harm. *Id.* at 339. If the Court can apply these standards in cases involving fines and in cases involving capital punishment, there is no reason why it cannot do so in cases involving prison sentences. In fact, the Court has stated that "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not." *Solem v. Helm*, 463 U.S. 277, 289 (1983). However, this is the effect of the Court's current interpretation of the Eighth Amendment, and it is in direct contradiction to the text of the Eighth Amendment.

Moreover, the Eighth Amendment is not the only area in which the Court applies a proportionality principle. For example, the Court has imposed proportionality limits on punitive damages under the Fourteenth Amendment. *See e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). As in the Eighth Amendment context, the Court examines the

gravity of the offense in terms of the harm caused and the blameworthiness of the defendant, and it compares the penalty at issue with penalties authorized or imposed in similar cases. *See id.* at 574-75. "Gravity" is no less subjective when the punishment involves a loss of money in a civil matter instead of a loss of liberty in a criminal case. Furthermore, as the Court has repeatedly recognized, punitive damages serve both retributive and deterrent purposes.[96] Thus, any problems this might cause in comparing penalties in the criminal sentencing context are also present in the punitive damages context. Yet the Court strengthened proportionality review with regard to punitive damages in *Cooper Industries, Inc. v Leatherman Tool Group* by applying de novo review. 532 U.S. 424, 436 (2001).

The Court also applies various forms of proportionality in other areas that, while perhaps less analogous to prison sentences, also do not lend themselves to an objective, straightforward application of proportionality. The Court recognized this fact in *Solem*, when it stated that it may be difficult to decide that a 25-year sentence violates the Eighth Amendment where a 15-year sentence would not but "[t]he courts are constantly called upon to draw similar lines in a variety of contexts." *Solem*, 463 U.S. at 294. As an example, the Court pointed to the task of determining whether or not a defendant's Sixth Amendment right to a speedy trial has been violated, *id.*, a right the Court has characterized as "amorphous" and "slippery."

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[96] *See e.g., Pacific Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 21 (1991); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Barker v. Wingo, 407 U.S. 514, 522 (1972). To determine if this right has been violated, the Court adopted a balancing test, which weighs the conduct of the government and the prejudice to the defendant against the conduct of the defendant. *Id.* at 530-34. Similarly, in the Fourth Amendment context, the Court routinely weighs the strength of the government interest in a search or seizure against the gravity of the intrusion into the person's privacy, liberty and property rights in situations where probable cause is absent. *See e.g.*, *Vernonia School District v. Acton*, 515 U.S. 646, 653-65 (1995); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619-33 (1989). It does so despite the recognition that "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," *Ker v. State of Cal.*, 374 U.S. 23, 33 (1963), and "[a]rticulating precisely what . . . 'probable cause' mean[s] is not possible." *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996). As these examples illustrate, judges are often required to apply a substantial degree of subjective judgment to a particular set of facts to determine whether an individual's constitutional rights have been violated. The task may not always be easy, but judges are not free to ignore the Constitution's dictates simply because following its commands is difficult.

In any event, these analogous areas demonstrate that conducting proportionality review is a manageable task. There is no reason to believe that judges cannot bring the same skills they apply in these contexts to conducting proportionality review in the case of criminal sentences. In fact, lower courts have had little trouble imposing a proportionality review in the sentencing

context. After *Solem* was decided, courts had "little difficulty applying the [three-part] analysis to a given sentence." *Harmelin v. Michigan*, 501 U.S. 957, 1015 (White, J. dissenting). Many state courts also apply a serious proportionality review in noncapital cases.[97]

If applying a proportionality principle to prison sentences is squarely within a judge's skill set, the only other potential administrability problem is the quantity of cases that could raise these issues. However, as the Court recently held in *Melendez-Diaz v. Massachusetts*, the requirements of the Constitution cannot be relaxed merely to make the prosecution of criminals less burdensome.[98] And application of a proportionality principle in a large number of cases will not overburden the courts. Courts do not appear to be overwhelmed by the task of determining whether sentences that depart from the federal Sentencing Guidelines are "reasonable" under *United States v. Booker*, 543 U.S. 220, 262-63 (2005). Furthermore, the burden of proportionality review can be reduced by instituting certain categorical rules – for example, that a sentence of life without parole is unconstitutionally disproportionate for a juvenile who did not take the life of another.

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[97] *See e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1184 (2009); *State v. Burgess*, 475 So.2d 35, 36-40 (La. Ct. App. 1985); *People v. Miller*, 781 N.E.2d 300, 307-08 (Ill. 2002); *State v. Davis*, 427 S.E.2d 754, 756 (W. Va. 1993); *State v. Bonner*, 577 N.W.2d 575, 581-82 (S.D. 1998); *People v. Lorentzen*, 194 N.W.2d 827, 831-33 (Mich. 1972).

[98] 129 S.Ct. 2527, 2009 LEXIS 4734 at *34 (2009).

CONCLUSION

For the foregoing reasons, the Court should hold the sentence imposed in the present case is unconstitutionally excessive.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

—v.—

FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

—v.—

FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, STATE OF FLORIDA

BRIEF OF COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, NATIONAL ASSOCIATION FOR JUVENILE CORRECTIONAL AGENCIES, NATIONAL JUVENILE DETENTION ASSOCIATION, NATIONAL PARTNERSHIP FOR JUVENILE SERVICES, AMERICAN PROBATION AND PAROLE ASSOCIATION, AND INTERNATIONAL COMMUNITY CORRECTIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

LIFE WITHOUT PAROLE SENTENCING FAILS TO RECOGNIZE THAT, UNLIKE MANY ADULT OFFENDERS, JUVENILE OFFENDERS POSSESS UNIQUE POTENTIAL FOR REHABILITATION 4

1. Juvenile offenders are a distinct offender category because they possess broad potential for change and rehabilitation 4

    a. The needs and characteristics which so define this population also identify the unique opportunity to repair and transform juvenile offenders 9

2. Juvenile and adult corrections can rehabilitate these offenders and protect the community 16

    i. Model programs within juvenile corrections 18

        1. The Missouri Department of Youth Services 21

        2. The Texas Youth Commission 23

3. The appropriateness of a life sentence imposed on a juvenile offender can

properly be measured only by a post-sentencing review of his or her development 28

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

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Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), August 2005.....19,21,23

INTEREST OF *AMICI*[1]

We are Corrections professionals, working within and outside the prison system as corrections officers, probation/parole officers, community corrections workers and prison administrators with juvenile and adult offenders. It is our responsibility to protect society, maintain order within our facilities, and to be responsive to the needs of those committed to our care and supervision.

The **Council of Juvenile Correctional Administrators (CJCA)** represents the youth correctional CEOs in fifty states, Puerto Rico, Washington, D.C. and some major metropolitan counties. Through the collaborative efforts of its members, CJCA has developed an expertise in designing and implementing the most effective practices for the treatment of juveniles within their care.

The **National Association of Juvenile Correction Agencies (NAJCA)** was founded in 1903 and is an affiliate of the American Corrections Association. Its members represent the broad spectrum of researchers, administrators and caretakers working in the juvenile corrections field.

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[1] The parties have consented to the filing of this brief and their consent letters have been filed with the clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The **National Juvenile Detention Association (NJDA)** is an national organization with over 400 individual members consisting of juvenile detention practitioners and administrators as well as 12 affiliate state juvenile detention associations. Since 1968, the NJDA has existed exclusively to advance the science and processes of juvenile detention services.

The **National Partnership of Juvenile Services** was formed in 2001 and is the operating structure of five distinct organizations including *amici* NAJCA and NJDA, as well as the Juvenile Justice Trainers Association, the Council of Educators for At-Risk and Delinquent Youth and the National Association of Children of Incarcerated Parents.

The **American Probation and Parole Association (APPA)** is an international organization, which represents approximately 35,000 probations and parole practitioners within juvenile and adult corrections, including line staff, supervisors and administrators. The APPA seeks to develop a system of probation and parole services that provides public safety by ensuring humane, effective and individualized sentences for offenders, and support and protection for victims.

The **International Community Corrections Association (ICCA)** represents more than 250 private agencies operating over 1500 residential and other community-based correction programs for children and adults; it also has over 1000 individual members. The ICCA member agencies offer a variety of services to the courts, Departments of Corrections, counties, cities and states throughout the United

States including drug treatment, counseling, supervision, and aftercare.

SUMMARY OF ARGUMENT

While we strongly believe that juveniles must be held accountable for their actions, condemning a juvenile to prison for the rest of his life at a point where his true character and potential cannot be accurately assessed is deeply troubling. In our professional capacities, we have experienced great successes with juveniles who others believed could not succeed. We believe the critical question for this Court is not "whether" but "when" – when is the proper and humane time to decide if a juvenile deserves to spend his life in prison. Empirical data, medical science and practical experience overwhelmingly shows that juvenile offenders are distinct from adult offenders and that these distinctions evince a unique potential for rehabilitation. We submit, therefore, that this determination can be made only in a post-adolescence review of the development and treatment progress of a juvenile offender.

ARGUMENT

LIFE WITHOUT PAROLE SENTENCING FAILS TO RECOGNIZE THAT, UNLIKE MANY ADULT OFFENDERS, JUVENILE OFFENDERS POSSESS UNIQUE POTENTIAL FOR REHABILITATION

1. JUVENILE OFFENDERS ARE A DISTINCT OFFENDER CATEGORY BECAUSE THEY POSSESS BROAD POTENTIAL FOR CHANGE AND REHABILITATION

Corrections professionals have long regarded juvenile offenders as a distinct offender category and recognize a responsibility to address the unique needs of these offenders. The American Corrections Association ("ACA") – the oldest and largest corrections association in the world[2] – recognizes that "[c]hildren and youths have distinct personal and developmental needs and must be kept separate from adult offenders."[3] The ACA has found that the developmental needs of juveniles "require highly specialized management and treatment by corrections professionals", irrespective of whether

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[2] *See* American Corrections Association, *Professional Certification, Standards and Accreditation*, http://www.aca.org/ (last visited July 21, 2009). The ACA provides professional development to the corrections workforce and promulgates national standards for the accreditation of corrections systems. *See id.*

[3] American Corrections Association, Public Correctional Policy on Juvenile Justice Policy ("ACA Juvenile Justice Policy"), (adopted Aug. 23, 1984, last amended Jan. 24. 2007), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=25&origin=results&QS='PoliciesAndResolutionsYMGHFREType=Policy&reversesearch=false&viewby=50&union=AND&startrec=1&top_parent=360 (last visited July 21, 2009).

juveniles are within the juvenile justice system or have been adjudicated as an adult and sentenced to prison.[4] To that end, the ACA has adopted a policy mandating separate housing and special programming for youth transferred to the adult criminal system.[5]

Similarly the American Jail Association ("AJA") – the only national association that exclusively focuses on the issues specific to the operation of local correctional facilities,[6]– resolved that the AJA "be opposed in concept to housing juveniles in any jail unless that facility is specifically designed for juvenile detention and staffed with specially trained personnel."[7]

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[4] American Corrections Association, Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction ("ACA Youthful Offender Policy"), (adopted Jan. 20, 1999; amended Jan. 14, 2004), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=51&origin=results&QS='PoliciesAndResolutionsYMGHFREType=Policy&reversesearch=false&viewby=50&union=AND&startrec=1&pg_360=2&top_parent=360 (last visited July 21, 2009).

[5] *See id.*

[6] *See* American Jail Association: *About AJA*, http://www.aja.org/aja/about/index.shtml (last visited July 21, 2009).

[7] American Jail Association, Resolution: Juveniles in Jails (adopted May 22, 1990, re-affirmed May 3, 2008), http://www.aja.org/aja/about/resolutions.shtml#JUVENILES_IN_JAILS. In adopting this position, the AJA relied in part on its determination that juveniles housed with adults may be victimized through homosexual rape and other violence, and that "the care and legal requirement of housing juveniles are not a part of an adult jail facility's responsibilities, and require specially trained staff and specially designed programming which are not readily available in an adult facility." *Id.*

The Association of State Correctional Administrators ("ASCA") - has also resolved, with regard to juveniles adjudicated as adults that:

> By virtue of their unique needs and legal circumstances, it is appropriates to qualify "juveniles," or youthful offenders, as a "special needs" population when they are admitted to adult corrections agencies, and to house and treat them accordingly.
>
> . . . .
>
> It is appropriate to provide special programs for these populations based on statutory requirements and individual needs assessments.[8]

The International Community Corrections Association ("ICCA") also regards children and youth as having "distinct personal and developmental needs that require specialized programs completely apart from adult offenders."[9]

The American Probation and Parole Association has similarly urged that juvenile justice both be responsive to the needs of a broad range of

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[8] Association of State Correctional Administrators Resolutions, Resolution #2 – Evaluating the Effects of Incarceration in Adult Facilities on Youthful Offenders (adopted Aug. 10, 1997; amended Sept. 22, 2006), http://www.asca.net/documents/Youthful.pdf.

[9] ICCA Public Policy on Juvenile Justice (Jan. 29, 2006), *available at* http://www.iccaweb.org/public.html (last visited July 21, 2009).

children and youth – even the most violent offenders – and to protecting society.[10]

Across the spectrum, corrections professionals have concluded that juvenile offenders, even within the adult corrections system, are a population with needs and characteristics that cannot be addressed through a traditional penological methodology. This belief is at the core of the juvenile corrections system, and is now underlying the establishment of Young Offender Divisions within adult corrections systems in many states.[11]

As widely recognized within corrections, proper treatment of juveniles within the corrections system must recognize and address their developmental needs. Medical science confirms both the need for categorical distinctions in the treatment of juvenile vs. adult offenders and the importance of addressing the developmental needs of juvenile offenders within both adult and juvenile corrections. Studies conclusively establish that the brain of an adolescent is not fully developed, particularly in the area of the prefrontal cortex, which is critical to higher order cognitive functioning and impulse

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[10] American Probation and Parole Association, Position Statement – Juvenile Justice (enacted Jan. 1996), http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=85432f61-443f-451a-bc59-29a37574f94e.

[11] *See* Patricia Torbet et al, *State Responses to Serious and Violent Juvenile Crime*, OJJDP RESEARCH REPORT (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), July 1996, at 25-34 (describing the attempts by some states to address the influx of juvenile offenders into the adult system through the establishment of Youthful Offender Divisions).

control.[12] When a juvenile is confined either to the juvenile or adult corrections system, regardless of sentence, the institution is responsible for addressing those neurobiological-based deficiencies by providing the tools for that juvenile's positive maturation into adulthood. It is therefore incongruous to impose a sentence that fails to acknowledge any such development.

> Kids today may be maturing physically earlier than before, but mentally they still require teaching, training, loving, skill-building, and learning through years of maturity. Bodies may be growing faster but no child is born with morals, with judgment, or with remorse; they learn these and other emotions and controls.

James A. Gondles, Jr. Executive Director, American Correctional Association[13]

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[12] *See* Josh Day et al., *Structure and Function of the Adolescent Brain: Findings from Neuroimaging Studies*, 175 ADOLESCENT PSYCHIATRY, Jan. 1, 2005, at 1-34; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860-61 (1999); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Logitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999).

[13] James A. Gondles, Jr., Editorial, *Kids are Kids, Not Adults*, CORRECTIONS TODAY (Amer. Corrections Assoc., Alexandria, Va), Feb. 2004, at 6.

a. The needs and characteristics which so define this population also identify the unique opportunity to repair and transform juvenile offenders

While this Court has recognized, and medical research has confirmed, the categorical immaturity and vulnerability ascribed to juveniles, *see Roper v. Simmons*, 543 U.S. 551, 569 (2005), in the juvenile offender population these developmental deficiencies coalesce with personal and environmental challenges that contribute to delinquent and criminal behavior.[14]

Corrections professionals working with the juvenile offender population encounter youth that are commonly simultaneously both victim and offender. A strong correlation between child maltreatment – abuse or neglect – and delinquent and criminal behavior in juveniles is well established.[15] Studies examining the prevalence of child maltreatment among juvenile offenders in various states reported results ranging from 29% to

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[14] *See* J. David Hawkins et al., *A Review of Predictors of Youth Violence*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS 119-146 (Loeber & Farrington, eds. 1998) (discussing the influence of family, community and peer factors in violent offending).

[15] *See* Richard Wiebush, Raelene Freitag, & Christopher Baird, *Preventing Delinquency through Improved Child Protection Services*, JUVENILE JUSTICE BULLETIN, (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), July 2001, at 1-3 (reviewing research establishing this link); Janet Wiig & Cathy Spatz Widom with John A. Tuell, *Understanding Child Maltreatment & Juvenile Delinquency: From Research to Effective Program, Practice, and Systemic Solutions*, CWLA PRESS, at 1-9 (2003) (same).

66% of offenders with reported or substantiated cases of child maltreatment.[16]

Juveniles who committed violent offenses are also more likely to have been victimized outside their home. The Office of Juvenile Justice and Delinquency Prevention reported a "strong link" between violent offending and violent victimization, with victimization defined as being shot or stabbed, threatened with a weapon or "jumped." Jennifer N. Shaffer & R. Barry Ruback, *Violent Victimization as a Risk Factor for Violent Offending Among Juveniles*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), December 2002, at 3. According to this study, juveniles who were victimized in year 1 were 3 times more likely than nonvictims to offend in year 2 (52% versus 17%).[17] *Id.* at 4. Clinical and epidemiological

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[16] Richard Wiebush et al. *supra* n. 15 at 2. In 2004, Florida ranked 1st in the country for substantiated victims of child maltreatment and 1st in the country for the number of African-American maltreated youth in out-of-home placements. John A. Tuell, Child Welfare League of America, *Building Bridges to Better Outcomes for Children: The Link Between Juvenile Justice and Child Welfare*, at 1 (final draft), *available at* http://www.cwla.org/programs/juvenilejustice/flwhitepaper.pdf (last visited July 21, 2009). The number of victims of child maltreatment in Florida that end up in the juvenile justice system is unknown, but a review by Florida's Office of Program Policy and Government Accountability of 90 case files of girls in juvenile justice residential programs found that 68% experienced physical or sexual abuse or neglect. *Id.* at 7.

[17] The study also reported that:

> Within year 1, juveniles who offended were 5.3 times more likely than nonoffenders to be victimized (37% versus 7%), and those who were victimized were 2.4 times more likely than nonvictims to offend (78% versus 32 percent).

studies indicate that at least three in four youth in the juvenile justice system have been exposed to severe victimization.[18] Vulnerability to victimization continues to be a significant issue for juvenile offenders while incarcerated. *See infra* n. 62.

Witnessing acts of violence alone is a substantial risk factor for juvenile violent offending.[19] Children who witness interparental domestic violence fare far worse than children with no exposure to this kind of violence, experiencing a range of emotional, behavioral, social and academic problems.[20]

> According to [State Correctional Institute] Houtzdale's Drug and Alcohol Treatment Specialist Heather Yasolsky,

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> Within year 2, juveniles who offended were 6 times more likely than nonoffenders to be victimized (42% versus 7%), and those who were victimized were 4 times more likely than nonvicitms to offend (66% versus 16%).

Jennifer N. Shaffer & R. Barry Ruback, *supra*, at 2-3.

[18] Julian Ford, et al., National Center for Mental Health and Juvenile Justice, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, June 2007, at 3.

[19] *See* Stacey Nofziger & Don Kurtz, *Violent Lives: A Lifestyle Model Linking Exposure to Violence to Juvenile Violent Offending*, 42 J. OF RESEARCH IN CRIME AND DELINQUENCY 3, 17-19 (2005) (finding that being a witness to violence increases the risk of offending by 769%).

[20] *See* Katherine Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCH., 339, 344, 345 (2003) (performing a meta-analysis of 118 studies and finding that 63% of child witnesses to interparental domestic violence were faring poorly as compared to their peers with no exposure).

> [Young Adult Offenders'][21] favorite programs are COPS-type of television shows.
>
> "I find it interesting that they are always so concerned with scenes that involve kids," Yasolsky said. "They were really concerned when one reenactment showed a highly explosive chemical used to make methamphetamines sitting right next to children's toothbrushes."
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> Yasolsky said YAOs are very protective of kids. She believes that they wish someone had protected them, thus avoiding their incarceration.

Pennsylvania's Young Adult Offenders - Treatment Staff Stories and Experiences, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 15.

The negative impact of trauma on the development of adolescents is plainly evident among the juvenile offender population.[22] "Traumatized adolescents typically do not lack a sense of self or values, but are often too anxious, angry, or confused to rely upon these psychological resources while struggling with a sense of being in constant danger."[23] Moreover trauma involving victimization by others is more likely than other forms "to lead to impairment in psychosocial functioning and physical

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[21] Juveniles sentenced for committing adult crimes in Pennsylvania are designated Young Adult Offenders.

[22] *Cf.* Julian D. Ford et al., *supra* n. 18, at 1-3 (discussing the negative impact of trauma on development).

[23] *Id.* at 2.

health."[24] Trauma can, therefore, further exacerbate the neurobiological and psychological immaturity of youth and, as a result, impair an adolescent's already more limited cognitive processing and behavioral regulation.[25]

> When exposed to trauma or mistreatment, a youth may cope by resorting to indifference, defiance, or aggression as self-protective reactions. In these cases, risk-taking, breaking rules, fighting back, and hurting others who are perceived to be powerful or vulnerable may become a way to survive emotionally or literally.[26]

As a result, perhaps, of the twin effects of trauma and developmental deficiencies, corrections professionals see a significant number of juvenile offenders with mental health issues. As many as 70 percent of juvenile offenders are affected with a mental disorder – depression, anxiety, post-traumatic stress, conduct disorders – and one in five suffer from a mental illness that impairs their ability to function.[27] Two-thirds of juvenile offenders with

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[24] *Id.*

[25] *See* Frank W. Putnam, *The Impact of Trauma on Child Development*, 57 Juv. & Fam. Ct. J., Winter 2006, at 1, 1-7 (discussing the neurological effects of child maltreatment on youth); Henry R. Cellini, *Child Abuse, Neglect and Delinquency: The Neurological Link*, 55 JUV. & FAM. CT. J., Fall 2004, at 1, 1-14 (discussing research showing the "clear connection" between child maltreatment and negative changes in a youth's neurological development).

[26] Julian D. Ford et al, *supra* n. 18, at 3.

[27] Sarah Hammond, National Conference of State Legislatures, *Mental Health Needs of Juvenile Offenders*, at 4 (2007); *see*

any mental health diagnosis most often had a dual diagnosis, typically substance abuse.[28]

In order to address the developmental needs of these offenders, corrections professions must first confront and repair the effects of trauma and victimization that have impaired normal development and socialization. While exposure to violence and victimization creates a significant risk for juvenile violent offending, the formation of positive social learning and social control factors – i.e. family and school attachments and other environmental factors that can serve to reject the propriety of violent behavior – mediates the risk of engaging in violent behavior.[29] As discussed *infra*, corrections professional have the ability to treat and reform these offenders.

Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, OJJDP NATIONAL REPORT (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), 2006, at 233. (reporting results of a survey designed to detect emotional problems showing that 90% of committed youth presented as having some type of emotional disorder; 71% more than one). 81% of committed youth surveyed indicated some degree of anger management problem; 61% also presented as experiencing anxiety and 59%, depression. Howard N. Snyder & Melissa Sickmund, *supra*, at 233. 27% of these youth reported suicidal feelings or ideation and 21% had attempted suicide at least once in their life. *Id.*

[28] Sarah Hammond, *supra* n. 27, at 5.

[29] *See* Angela R. Gover, *The Effects of Child Maltreatment on Violent Offending Among Institutionalized Youth*, 17 VIOLENCE AND VICTIMS 655, 657, 662 (2002) (discussing various studies and reporting that in a study of over 3000 juvenile offenders across the country, the increased likelihood of violent offending created by the effect of child maltreatment was mediated by social learning and social control factors)

> My philosophy in working with Young Adult Offenders (YAOs) is that if you keep them feeling safe, they will grow and develop and allow you to lead them. If for any reason that YAO feels that safety is jeopardized, he has a tendency to revert to behavior he knows from the streets and that often includes violence. The inmates who enter the Young Adult Offender Program often come into the facility in what we refer to as "survival mode." Until we can teach them that there is more to life than just survival, they test us as staff. One day you come to work, and the inmate who has been the biggest problem in the program has a new look about him. He is following the rules and being respectful, for the first time taking responsibility for himself. That is the day you know that you have been able to reach that inmate.

J. Barry Johnson, former Superintendent (2000-2007) SCI Pine Grove – a maximum-security correction facility for Young Adult Offenders in Pennsylvania.[30]

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[30] *Pennsylvania's Young Adult Offenders - Message from Superintendent Johnson*, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 3.

2. JUVENILE AND ADULT CORRECTIONS CAN REHABILITATE THESE OFFENDERS AND PROTECT THE COMMUNITY.

> We know so much more today about "what works" than we knew 30, 20 and even 10 years ago. Evidence- and research-based approaches to reducing juvenile crime and improving recidivism rates are gaining in acceptance and implementation. We are getting better at targeting our prevention resources for high-risk children before they have serious involvement in the system. We are improving our screening and assessment tools to better understand both the strengths and weaknesses of the families and young people we see. We are doing a better job of training our work force to meet the challenges of juvenile crime in the new millennium.

Francisco "Frank" J. Alarcon, Deputy Secretary, Florida Department of Juvenile Justice[31]

Despite the widespread and inaccurate misconception that violent juvenile offenders are – as evidenced by the nature of the offenses they have committed – incapable of being rehabilitated, we see a remarkable amount of success with these offenders. The wealth of research now available on violent behavior in youth has provided corrections

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[31] Francisco "Frank" J. Alarcon, Commentary, *Juvenile Corrections: Why Would Anyone Want to Work in This Business?*, CORRECTIONS TODAY (Amer. Correctional Assoc., Alexandria, Va), Feb. 2004, at 8.

administrators, staff and probations officers with the tools needed to implement effective rehabilitation efforts. In recent years, there has been an increase in the availability and use of evidence-based practices - practices that controlled research shows to have resulted in improved outcomes - in treating juvenile offenders.[32] Research indicating that aspects of the brain regulating cognitive and behavioral responses are undeveloped in adolescents[33] has guided corrections professionals toward effective cognitive and behavioral therapies. According to a 2007 survey, 88% of states utilize Cognitive-Behavioral Therapy in their juvenile facilities, 57% use Aggression Replacement Therapy, and many also use a number of other therapies – Functional Family Therapy, Multi-systemic Therapy, and Therapeutic Foster Care among others – designed to address the social and environmental stressors that contribute to delinquent and criminal behavior.[34]

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[32] Edward J. Loughran & Kim Godfrey, CJCA YEARBOOK 2007: A NATIONAL PERSPECTIVE OF JUVENILE CORRECTIONS, (Council of Juvenile Correctional Administrators) ("CJCA YEARBOOK") 55 (2008).

[33] *See* R.K. Lenroot & J.N. Giedd, *Brain Development In Children And Adolescents: Insights From Anatomical Magnetic Resonance Imaging*, 30 NEUROSCI. & BEHAV. REVS. 718, 723 (2006) (discussing the neurobiological basis for adolescents' lesser ability as compared to adults, to self-regulate their behavior); Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756-57 (2000) (discussing cognitive and psychosocial immaturity in adolescents); *see also supra* n. 12.

[34] CJCA YEARBOOK, *supra* n. 32, at 55-56.

Performance-based Standards (PbS), a system launched by the Office of Juvenile Justice and Delinquency Prevention and directed by the Council for Juvenile Correctional Administrators ("CJCA"), now sets national standards establishing the highest quality practices and treatment services for incarcerated youth and monitors participating facilities by outcome measures that report on the safety, security, order and climate within facilities as well as education, health/mental health, programming and reintegration services. *Welcome to Performance-based Standards*, http://pbstandards.org/ (2009). For serious and violent juvenile offenders, juvenile and adult corrections embrace a model that balances accountability and security with the delivery of services – developmental, educational, mental health – that address the special needs of this population.[35]

i. Model programs within juvenile corrections

While some violent offenders are transferred into the adult system, the juvenile system also retains a significant number – either adjudicated delinquent or tried as an adult but serving all or part of their sentence in a juvenile facility. The 2006 Census of Juveniles in Residential Placement revealed that of the approximately 92,000 youth held in juvenile residential facilities, 23% committed violent crime index offenses (criminal homicide,

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[35] *See* Council of Juvenile Correctional Administrators, Position Paper on Waiver and Transfer of Youth to Adult Systems, *available at* http://cjca.net/photos/content/documents/Waiver.pdf (last visited July 21, 2009); ACA Youthful Offender Policy, *supra* n. 4.

violent sexual assault, robbery, aggravated assault).[36] Melissa Sickmund, T.J. Sladky, and Wei Kang, Census of Juveniles in Residential Placement Databook (2008) ("CJRP Databook"), http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp. Further, 10% of all the juveniles in residential placement were placed there for a burglary offense. *Id.* Only 5% of all juveniles in these facilities were held for status offenses (running away, truancy, incorrigibility, underage drinking).[37] *Id.*

The experience of juvenile corrections in treating this population has led to improved outcomes[38] and models for success. More

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[36] In 2006, juvenile facilities held 6792 juveniles committed for sexual assault, 6707 committed for robbery, 7289 committed for aggravated assault, and 988 committed for homicide. Melissa Sickmund, T.J. Sladky, and Wei Kang, Census of Juveniles in Residential Placement Databook (2008) ("CJRP Databook"), http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp. A 2007 survey by the CJCA including youth in residential and non-residential juvenile corrections services reported a population of more than 225,000 youth, 27% of whom committed violent crime index offenses. CJCA YEARBOOK 2007, *supra*, at 26.

[37] The remaining categories of juveniles confined include 15% committed for other property offenses (theft, arson, other), 11% committed for public order offenses (weapons, other), 9% committed for drug offenses, and 11% committed for simple assault or other person offenses. CJRP Databook, *supra* n. 36.

[38] Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), August 2005, at 6; *see* Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS 338 (Loeber &

importantly, positive results are not difficult to replicate. The efficacy of rehabilitation programs do not vary based on the characteristics of the juvenile offenders treated (including the nature of the offenses committed and prior offense history).[39] Rather, program characteristics – the way a program is organized, staffed, administered – have been found to be the most important factor impacting program effectiveness; in particular, larger treatment effects were found for more well-established programs.[40] Treatment type and amount was next in significance – the longer the treatment, the greater the effectiveness.[41] The type of treatment shown most effective was interpersonal skills programs – those that focused on social skills training, anger management, moral education, etc.[42] Aftercare programs upon release that prepare juveniles for re-entry into the community, are also essential to

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Farrington, eds. 1998) (conducting a meta-analysis of 200 studies of interventions with institutionalized and non-institutionalized youth and finding that treatment programs for serious and violent offenders have been shown reduce recidivism by as much as 40%).

[39] *See* Mark W. Lipsey, David B. Wilson, & Lynn Cothern, *Effective Intervention for Serious Offenders*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), April 2000, at 3 (finding in a meta-analysis of 83 studies of programs for institutionalized serious violent and nonviolent offenders that offender characteristics had the smallest effect on outcomes).

[40] *Id.* at 3, 4.

[41] *Id.* at 3.

[42] *Id.* at 3-4; Office of Juvenile Justice and Delinquency Prevention, *Critical Findings: Serious and Violent Juvenile Offenders*, http://ojjdp.ncjrs.org/pubs/makingadiffer/critical_1.html (last visited July 21, 2009).

continued progress once juvenile offenders are released.[43]

1. The Missouri Department of Youth Services

Missouri's system has had extraordinary success reducing recidivism through a system of regional small-scale secure correction centers and an array of community-based non-residential programs and group homes.[44] In Missouri's Department of Youth Services ("MDYS") for 2008, 13% of the youth were committed for the most serious felonies (A&B felonies) and 41% for other felonies.[45] Missouri Division of Youth Services: Research & Evaluation, *Annual Report: Fiscal Year 2008* ("*MDYS 2008 Annual Report*"), at vi (2009). The Division of Youth Services receives juveniles tried as adults with blended sentences – juvenile and adult sentences imposed with the execution of the adult sentence suspended.[46] In 2008, 46% of youth admitted to MDYS had a history of prior mental health services, 54% had a history of prior substance abuse involvement, and 23% were identified as having an educational disability. *MDYS 2008 Annual Report*, *supra* at vi.

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[43] *Serious and Violent Juvenile Offenders*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), May 1998, at 6.

[44] Zavlek, *supra* n. 38 at 8.

[45] 37% were committed for misdemeanors and other non-felonies; 10% for juvenile (status) offenses. *MDYS 2008 Annual Report*, *supra*, at vi.

[46] Missouri Division of Youth Services, *Dual Jurisdiction Program: A Sentencing Option for Youthful Offenders*, at 2, *available at* http://www.dss.mo.gov/dys/pdf/djp021705.pdf (last visited July 21, 2009).

Three-fourths of offenders committed to MDYS are assigned to non-residential community programs and less secure facilities. Zavlek, *supra* n. 38 at 8. This allows the medium to high-security facilities to maintain a smaller population and provide individualized treatment for each youth. Treatment addresses issues including victim empathy, social skills, anger/emotions management, healthy thinking patterns and coping skills, peer influences, substance abuse, and self-esteem; much of the programming centers around group dynamics and processes.[47] Missouri's approach utilizes constant therapeutic interventions and minimal force.

> In a typical juvenile corrections environment, Mr. Decker [Director of MDYS] said, if a youth becomes aggressive "you would have guards drag him into isolation" for three days.
>
> "But," he added, "the problem is that a young person doesn't learn how to avoid that aggressive behavior and it will get worse."
>
> In Missouri Hills [one of the MDYS facilities], isolation rooms were used only about a dozen times last year, Mr. Decker said, and never for more than a few hours. Pepper spray is banned, and youth are taught to de-escalate fights or apply grappling holds, a form of restraint.

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[47] *DYS Frequently Asked Questions: Treatment Services*, http://www.dss.mo.gov/dys/faq/treatserv.htm (last visited July 21, 2009).

> [One juvenile] explained how her housing unit does a "circle-up," or ad hoc counseling session, several times a day, whenever there is a conflict, like cursing.
>
> . . . .
>
> When someone becomes unruly, the other youth are trained to talk him down.[48]

MDYS's recidivism rate based on the recommitment to MDYS after 24 months of release was 10% for 2008 and had been between 7-9% for the 4 years prior to 2008. *MDYS 2008 Annual Report*, at 18. Moreover, as of 2005, only 7% of youth released from MDYS were in Missouri's prisons 5 years after their release. Zavlek, *supra* n. 38 at 30. Missouri's model is also cost-effective – MDYS's budget in 2000 amounted to about $94 per youth in Missouri's population, while the average budget in the eight states surrounding Missouri was approximately $140 per youth. *Id.*

2. The Texas Youth Commission

The Texas Youth Commission ("TYC"), although undergoing some changes in programming,[49] has had proven success treating

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[48] Solomon Moore, *Missouri System Treats Juvenile Offenders with Lighter Hand*, N.Y. TIMES, March 27, 2009, available at http://www.nytimes.com/2009/03/27/us/27juvenile.html?pagewanted=1&_r=1 (last visited July 21, 2009).

[49] TYC is now in the process of implementing a new general treatment program CoNEXTions - that combines cognitive-behavioral based interventions, an aggressive skills and motivation component, an aggressive community integration and a strong academic or workforce development component.

youth convicted of serious violent offenses and sex offenses. TYC in 2008 had 83% of committed youth with an IQ less than 100, 58% had prior out of home placements, 33% had a history of abuse and neglect, 49% had a family history of criminal behavior, 36% was special education eligible and 32% had a serious mental health diagnosis. Texas Youth Commission: Research and Planning Department, *Review of Agency Treatment Effectiveness: Fiscal Year* 2008 ("*TYC Review 2008*"), at 3 (2008). TYC offered Resocialization as its primary treatment intervention, which focused on three major areas: academic and workforce development, behavior modification, and correctional therapy. *Id.* at 7.

The specialized treatment programs were based on the Resocialization model but with emphasis on the specific treatment need.[50] *Id.* at 7-8.

TYC Review 2008, *supra* at 16. The Specialized treatment programs are currently being updated to integrate practices from this treatment model. *Id.* at 7-8.

[50] In the general program, an offender progressed through a system of four "phases" in each area - Orientation, Life Story, Offense Cycle, and Success Plan - that required youth to learn and demonstrate competency in a series of objectives designed to reduce the probability of offending. *Id.* at 7. In the specialized program:

> Life Stories included additional focus on the etiology and development of those specific risk areas associated with the specialized need being addressed. Offense cycles were expanded to include understanding of how aggressive, sexual or drug related behavior patterns emerged and were maintained with emphasis on how they could be modified. Success Planning addressed specific risk management issues in the community to address these specialized risks. In addition, those in the specialized programs

The Capital and Serious Violent Offender Treatment Program, operated within the high-security Giddings State School, is an intensive 24-week program, where youth enroll after spending years in general population.[51] Through extended group therapy sessions "[t]he program helps these young people connect feelings associated with their violent behavior and to identify alternative ways to respond when faced with risky situations in the future. Participants in this program are required to reenact their crimes and to play the role of both perpetrator and victim." Texas Youth Commission, *Specialized Correctional Treatment*, http://www.tyc.state.tx.us/programs/special_treat.html (last visited July 21, 2009). The Sexual Behavior Treatment Program is a structured 12-18 month program operating at three TYC institutions. *TYC Review 2008*, *supra* at 8. The program builds on the agencies treatment program with individual and group counseling focusing on the youth deviant sexual behavior, includes psychosexual education and, for youth with abuse histories, trauma resolution therapies. Texas Youth Commission, *Specialized Correctional Treatment*, *supra*.

Both programs have been shown effective in reducing recidivism. Notably, in 2008, the re-arrest rate within 12 months for a violent offense was 3% for those in the sex offender program and 2% for the

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> received Psycho-educational programming to help them better understand "normal" development and social customs.

TYC Review 2008, *supra*, at 8.

[51] John Hubner, LAST CHANCE IN TEXAS xxiv(2005); *TYC Review 2008*, *supra*, at 8.

violent offender program. *TYC Review 2008* at 10-11. The treatment effectiveness of the programs were measured as compared to a control group (offenders with high risk for sexual or violent re-offense who did not participate in this program) and both showed large differences.[52] *Id.* at 5, 18. The violent offender program participants were 36% less likely to be arrested for any offense and 68% less likely to be arrested for a violent offense within 1 year; the sex offender program participants were 62% less likely to be rearrested for a violent offense within one year and 18% less likely to be incarcerated for any offense within three years. *Id.* at 10, 11.

Other states and jurisdictions have embraced these models. The District of Columbia, Santa Clara County (Ca.), San Francisco City and County (Ca.), New York, Louisiana and New Mexico are now working with the Missouri Youth Services Institute[53] to implement changes to their systems.[54] The District of Columbia has recently announced the

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[52] The sex offender control group had a 5% rate of re-arrest and the violent offender control group had an 8% rate of re-arrest rate for violent offenses. While there was a statistically significant difference for the sex offender group, the difference between the capital offender group and the control group was not significant because of the small sample size. *Id.* at 18.

[53] The Missouri Youth Services Institute is a not-for-profit founded by Mark D. Steward, former Director of Missouri Youth Services to assist juvenile systems in their reform efforts. *Missouri Youth Services Institute: Home*, http://mysiconsulting.org/index.php (last visited July 21, 2009).

[54] *See About Missouri Youth Services Institute: Where We Are Working*, http://mysiconsulting.org/about.php (last visited July 21, 2009).

opening of a new secure facility for serious juvenile offenders – the "New Beginnings Youth Development Center" – that will adopt a nine-to-twelve month behavior modification program modeled after the Missouri approach for the most serious and chronic young offenders.[55] The D.C. Department of Youth Rehabilitation Services has reported a 50% decrease in recidivism among their youth in secure custody since 2005 through an increased focus on rehabilitation.[56] Rhode Island recently announced a proposal to implement the Resocialization System utilized by the TYC.[57]

Though information-sharing and the implementation of research-based practices, the rehabilitation of violent juvenile offenders is not a theoretical possibility, it is a practical reality.

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[55] *DYRS: Secure Program*, http://dyrs.dc.gov/dyrs/cwp/view,a,3,q,599546.asp (last visited July 21, 2009). *Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth*, Press Release, May 30, 2009, http://newsroom.dc.gov/show.aspx/agency/dyrs/section/2/release/17227.

[56] *Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth, supra.*

[57] *See generally* Rhode Island Dept of Children, Youth and Families, *Proposal to Implement a New Treatment and Resocialization System for Adjudicated Youth in Rhode Island*, http://www.dcyf.state.ri.us/docs/rits_resocial.pdf (last visited July 21, 2009).

3. THE APPROPRIATENESS OF A LIFE SENTENCE IMPOSED ON A JUVENILE OFFENDER CAN PROPERLY BE MEASURED ONLY BY A POST-SENTENCING REVIEW OF HIS OR HER DEVELOPMENT

A lifetime in prison is a punishment reserved for few offenders. 95% of all those incarcerated in state prison will be released.[58] In 2007, the median sentence length for felons sentenced to incarceration was 72 months for rape, 60 months for robbery, 24 months for aggravated assault, and 24 months for burglary.[59] Even in the 75 largest counties in the nation, which account for about half of all reported violent crime in this country, the median sentence was not significantly higher.[60] From 1990 to 2002, in these counties, the median sentence received was 120 months for rape, 60 months for robbery and 48 months for assault.[61]

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[58] Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, Reentry Trends in the United States: Inmate Returning to the Community After Serving Time in Prison, http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm (last visited July 21, 2009).

[59] Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004- Statistical Tables – Table 1.3 Mean and Median Felony Sentence Lengths in State Courts, by Offense and Type of Sentence, 2004, *available at* http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04103tab.htm (last visited July 21, 2009). The median calculation includes those sentenced to life or death sentences. *Id.* The mean calculation, which excludes life and death sentences were higher – 123 months for rape, 86 months for robbery, 41 months for aggravated assault, and 40 months for burglary. *Id.*

[60] *See* Brian A. Reaves, *Violent Felons in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (BJS, Wash, D.C.), July 2006, at 1, 8.

[61] *Id.* at 8.

For juveniles, a lifetime in prison has a greater and harsher significance than for adults. Juveniles will grow into adulthood in prison and will serve much longer than adult offenders. Moreover, younger offenders are a vulnerable population in adult facilities, with higher suicide rates and greater risk of physical and sexual assault than adult offenders[62] – of particular concern for those juveniles placed in general population with adults.[63]

In addition, the separate juvenile and adult adjudications of violent offenses distorts a criminal court judge's ability to assess the proportionality of the imposition of a life sentence on a youth. In 2005, juvenile courts disposed of an estimated[64] 81,600 delinquency cases involving violent crime index offenses (murder, non-negligent manslaughter,

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[62] *See* Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy*, 40 JUV. & FAM. CT. J., 1989, at 1, 9-10. (finding that young people in adult prisons are at greater risk for sexual and physical assault than both older inmates and comparable youths in juvenile facilities); Michael G. Flaherty, *The National Incidence of Juvenile Suicide in Adult Jails and Juvenile Detention Centers*, 13 SUICIDE AND LIFE THREATENING BEHAVIOR, 85-94 (1983) (finding that the suicide rate for juveniles in jail is eight times that of juveniles in detention centers).

[63] In 1995, "[t]wenty-seven [Department of Corrections] house those offenders under age 18 in the general population of adult institutions or in protective custody within those institutions if needed." *Offenders Under 18 in State Adult Correctional Systems: A National Picture*, SPECIAL ISSUES IN CORRECTIONS, (LIS, Inc., Longmont, Co.), Feb. 1995, at 3, 5-6.

[64] Estimates are based on data from over 2100 courts with jurisdiction over 80% of the juvenile population. Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2005*, OJJDP FACT SHEET, (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), June 2009, at 1.

forcible rape, robbery, and aggravated assault).[65] Of the estimated 429,500 total person offense cases disposed of by the juvenile court in 2005, only 3,500 were waived to criminal court.[66] Although cases transferred by judicial waiver do not represent the entire universe of juvenile cases filed in criminal court (statutory exclusion and prosecutor direct file cases), 2005 juvenile arrests data suggests that the vast majority of these violent crime index cases are resolved in juvenile court.[67] Therefore, juvenile courts adjudicated a substantial number of cases involving similarly situated violent offenders never exposed to a life without parole sentence. One study revealed that violent young offenders in the adult system received sentences five times longer than those retained in the juvenile system with similar offense characteristics.[68]

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[65] According to estimates, juvenile court disposed of 1,400 criminal homicide, 4,400 forcible rape, 26,000 robbery, and 49,900 aggravated assault cases. *Id.* at 2.

[66] *Id.* at 3.

[67] In 2005, an estimated 95,300 violent crime index arrests of juveniles were made, which even assuming that all the person offenses waived to criminal court were violent offenses, still suggests that a substantial number of these cases were resolved in juvenile court – 95,300 – 81,600 (cases in juvenile court) + 3500 (judicial waiver) = 17,200 (cases in criminal court). Howard N. Snyder, *Juvenile Arrests 2005*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 3. In 2005, an estimated 7% of all juvenile arrests – 149,800 out of 2.14 million total arrests - were referred directly to criminal court. *Id* at 5.

[68] Cary Rudman et. al, *Violent Youth in Adult Court: Process and Punishment*, 2 CRIME & DELINQUENCY 75, 88-89 (1986); *see also* Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. OF CRIM. L. & CRIMINOLOGY 449, 485-89 (1996) (finding that violent

The imposition of a life without parole sentence on juveniles must take some account of a juvenile offenders' unique capacity for rehabilitation. Decades of social research shows that most youth "age-out" of engaging in reckless and criminal behavior. During the period of adolescence, because of the developmental deficiencies discussed *infra*, recklessness and most criminal behavior is at its peak.[69] "[M]ost participants in adolescent delinquency desist from involvement by early adulthood, even those most involved during adolescence."[70]

Thus, confidently predicting that a juvenile offender's criminal behavior will persist is almost impossible. Jurists are unable to predict serious criminal behavior in juveniles.[71] The American

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young offenders in adult courts received sentences about five times longer than violent juvenile offenders).

[69] *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992); *see* Patrick H. Tolan & Deborah Gorman-Smith, *Development of Serious and Violent Offending Careers*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 73 (Rolf Loeber and David Farrington, eds. 1998) (discussing established findings that crime prevalence increases during early adolescence for most crimes, except drug sales, which peaks in early adulthood).

[70] Tolan & Gorman Smith, *supra* n. 69, at 73.

[71] *See* Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. OF CRIM. L. & CRIMINOLOGY, 415, 437-38, 447 (1996) (reporting results of a study showing that judges rendered inaccurate predictions of future dangerousness of juveniles in more than eight-out-of-ten cases for preventive detention determinations); *See generally* Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1, 1 (1985) (arguing that, because of limited reliability, "[t]he use of predictions of dangerousness to alter

Psychiatric Association holds the position that "[a]lthough mental health professionals are able to characterize the functional and behavioral features of an individual adolescent, their ability to reliably predict future character formation, dangerousness, or amenability to rehabilitation is inherently limited." Brief for the American Psychological Ass'n, & Missouri Psychological Ass'n as *Amici Curiae* Supporting Respondent at 19, *Roper v. Simmons*, 543 U.S. 551 (2005).

Prior dire predictions about the trends in juvenile offender behavior and patterns similarly have proved inaccurate. Despite forecasts in the 1990's of the juvenile super-predator, the threat never materialized.[72] Since then violent juvenile crime has decreased significantly – the juvenile arrest rate for murder is down 77% from its 1993 peak; the rate for forcible rape is 54% less than its 1991 peak and even below the 1980 level; the rate for robbery is 47% less than its 1995 peak; and the arrest rate for aggravated assault has reached its lowest level since 1980, down 41% from its 1994 peak. Charles Puzzanchera, *Juvenile Arrests 2007*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 6.

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individual dispositions should be allowed only to the extent that such dispositions would be justified as deserved independent of those predictions").

[72] *See generally* Shay Bilchik, *Challenging the Myths*, 1999 National Report Series, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), Feb. 2000 (discussing the lack of statistical support for the "super-predator" theory).

Predictions as to juvenile behavior, both globally and individually, have proven erroneous. To ensure that those juveniles sentenced to a lifetime in prison are deserving of such a sentence requires the ability to assess that juvenile once he has entered adulthood. This does not prevent a child with sufficient culpability who does not respond to treatment from serving a very lengthy sentence.

CONCLUSION

Only a post-adolescence review can assure the suitability of a life sentence. Moreover, an opportunity for post-sentencing review of the progress of juveniles allows corrections and social service professionals working closely with juveniles to provide an educated evaluation of that youth's development and progress toward rehabilitation.

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AMICUS CURIAE BRIEF

(24) (25)

Nos. 08-7412 and 08-7621

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

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STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the Florida District Court of Appeal for the First District

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. When the only federal premise for a state procedural default rule is the clearly correct determination that no existing precedent dictates the rule defendant asserts, does the judgment rest on a state ground independent of the different federal question of whether such a rule should be created?

2. If so, does this Court have jurisdiction to consider the merits of whether the new rule should be created?

3. Does the Eighth Amendment forbid the imposition of a life-without-parole sentence upon any defendant for any crime, other than homicide, committed before his 18th birthday, regardless of the circumstances of the offense or the length or severity of his criminal record?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 6

I

The judgment in *Sullivan* rests on an adequate state ground independent of the federal question presented to this Court 6

II

The finality of an executed death sentence makes *Roper* v. *Simmons* fundamentally different from the present case 12

III

The developmental psychology studies proffered by the mental health *amici* do not support a rigid constitutional cutoff at the 18th birthday 14

Conclusion 25

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma, 470 U. S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) 9, 10

Bonifay v. State, 909 So. 2d 861 (Fla. 2005) 8

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U. S. Const., Amdt. 10 25

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioners in these cases seek to place a constitutional constraint on the states forbidding a life-without-parole sentence for anyone prior to his 18th birthday, regardless of the offense (possibly excepting homicide) and regardless of the person's criminal history. In a few extreme cases, society and the victims of crime need the assurance that perpetrators will never be released through routine parole proceedings but only, if ever, through executive clemency, which in most states is a decision made by an official directly responsible to the people. The rule petitioners seek is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

A. Graham v. Florida.

On December 6, 2004, 31 days short of Terrance Graham's 18th birthday, see J. A. (Graham) 50; Brief for Petitioner Graham 11, armed robbers forced their way into the home of Carlos Rodriguez in Jacksonville, Florida, locked him in a closet at gunpoint, and robbed a friend who was present in the apartment. J. A. 111-115. Mr. Rodriguez positively identified Graham as the first one in the door, the one who pointed a gun at his stomach, and the one who appeared to be the leader of the group. J. A. 318. There is also substantial circumstantial evidence that Graham was a party to another home invasion robbery later the same night. J. A. 58.

These crimes were not Graham's first. At the age of 16, he pleaded guilty to the robbery of a restaurant, during which "his codefendant assaulted the restaurant

owner with a pipe." J. A. 407. He received a lenient sentence for this crime of only "three years' probation with the condition that he serve twelve months in a pre-trial detention facility." J. A. 407. He was out of jail less than six months before committing the robberies for which he was caught, but upon his arrest he admitted to the police that "he was involved in 'two or three before tonight.' " J. A. 407.

"Following the probation hearing, the trial court found appellant guilty of the alleged violations and sentenced him to life imprisonment without the possibility of parole." J. A. 408. The trial judge noted that many people had tried to help him turn his life around after the first robbery, and he had chosen to throw it away. *Ibid.* The Court of Appeal rejected the claims that a life sentence for juveniles was *per se* unconstitutional and that his sentence was grossly disproportionate to his crime. J. A. 431. The Florida Supreme Court denied review. J. A. 433.

B. Sullivan v. Florida.

In 1989, Joe Sullivan, then age 13, burglarized the home of an elderly woman along with two accomplices. See Brief in Opposition (BIO) 3. Later that day, Sullivan and one of the accomplices returned to the home. While the accomplice distracted the woman at the front door, Sullivan began to enter through another door. *Ibid.* He forced his way in as she resisted the entry. He covered her head, removed her clothes, beat her, raped her vaginally and orally, and threatened to kill her. The identification of Sullivan, rather than the accomplice, as the perpetrator was made by the victim's recognition of his voice, both a neighbor and a police officer who saw him running from the house, and his palm print in the bedroom. BIO 4-5. Sullivan had been found guilty of 17 crimes in the prior two years, includ-

ing several felonies, one of which was a burglary. BIO 5. During a previous juvenile detention, he had assaulted other clients. BIO 5-6.

Sullivan was convicted of two counts of sexual battery and two counts of burglary. He was sentenced to life in prison on the sexual battery counts. J. A. (Sullivan) 21. The conviction and sentence were affirmed on direct appeal. J. A. 22. A motion for postconviction relief was denied. J. A. 23. A writ of habeas corpus was denied. J. A. 24-25. On July 24, 2007, Sullivan commenced the present proceeding, a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. J. A. 21.

Rule 3.850 has a time limit of two years after the judgment became final with an exception, among others, for newly established, retroactive constitutional rights. Rule 3.850(b)(2); Brief for Respondent (No. 08-7621) 2. Sullivan argued to the trial court that, "*Roper v. Simmons* dictates sentencing relief for thirteen-year-olds sentenced to die in prison." J. A. 37 (capitalization altered). The trial court found, "*Roper* has established no such constitutional right. Rather, *Roper* established only one new constitutional right, the right for a juvenile not to be given the death penalty." J. A. 58. "Hence, Defendant's claim does not fit into any exception to the time limits in rule 3.850 and must be dismissed as procedurally barred." *Ibid.* The trial court also found in the alternative that Sullivan's "argument is meritless." *Ibid.* The Florida Court of Appeal summarily affirmed. J. A. 73. "In this posture of the case, Florida law precluded review by the state Supreme Court." Brief for Petitioner 4.

SUMMARY OF ARGUMENT

In *Sullivan*, the state court decision rests on a state ground that is independent of the question petitioner asks this Court to decide. The only federal premise of the state court's decision is the clearly correct statement that *Roper* v. *Simmons* did not establish a new right regarding noncapital sentences. Under *Fox Film Corp.* v. *Muller*, a clearly correct federal premise to a court ruling on state law is insufficient to give this court jurisdiction to review a different federal question not necessary to the judgment.

The developmental psychology research cited in the brief of the mental health *amici* does not support the rule petitioners seek. On the contrary, that research supports the conclusion that teenagers are not a homogenous mass, and courts can and should distinguish the differences among them. Some teens engage in significant illegal behavior only in adolescence and are likely to desist in young adulthood. Others are life-course-persistent offenders who are likely to victimize others into middle age if we let them. The latter group is distinguished by the length of antisocial behavior and by the commission of crimes of violence, the same factors courts typically use in determining sentences.

ARGUMENT

I. The judgment in *Sullivan* rests on an adequate state ground independent of the federal question presented to this Court.

In *Sullivan*, No. 08-7621, the case comes to this Court on a writ of certiorari to a state court under 28 U. S. C. § 1257. The state court petition under Florida Rule of Criminal Procedure 3.850 (2009) ("Rule 3.850") was petitioner's third collateral attack on the judgment, see J. A. 22-24, and it was commenced 16 years after the judgment became final on direct appeal. See J. A. 21-22. The Florida rule, like its federal counterpart, has both a time limitation and a successive petition limitation. See Rule 3.850(b), (f); cf. 28 U. S. C. §§ 2255(f), (h).[2] The Circuit Court held,

> "Consequently, at this time, the Court may address Defendant's claims only if they fall into the enumerated exceptions to the two-year time limitation and could not have been raised in Defendant's original 3.850 motion. Defendant's claim under *Roper* could not have been raised in his original 3.850 motion because his motion was filed many years before the United States Supreme Court ruled on *Roper*, thereby escaping dismissal based on successiveness. However, the Court finds that the claim raised in the instant motion, based on *Roper*, does not fit into the limited category of claims allowed to be brought after the expiration of the two-year filing period." J. A. 56-57.

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2. The predecessor of Rule 3.850 was substantially a copy of 28 U. S. C. § 2255. See *Gideon* v. *Wainwright*, 153 So. 2d 299, 300 (Fla. 1963) (on remand). The state and federal rules have since diverged somewhat.

If this holding is an adequate and independent state ground, then review in this Court under § 1257 is jurisdictionally barred. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992). At the certiorari stage, petitioner attempted to brush off this issue with the conclusory assertion that the state court judgment rested on a "threshold evaluation of the underlying federal constitutional claim." Reply to Pet. for Cert. 9. Remarkably, petitioner does not address the issue at all in his brief on the merits. Obviously, the Court's decision to grant the writ of certiorari cannot be construed to have resolved this question, if for no other reason because a decision to grant that writ does not require a majority of the Court.

The problem requires a closer examination. Many states, like the federal government, have struggled to place reasonable limits on collateral review to bring some finality to criminal cases, while still holding open the possibility of relief for cases of genuine miscarriages of justice.[3] This process has produced rules with intricate exceptions. A federal procedural default doctrine that punished states for making exceptions, brushing aside their judgments in cases not qualifying for the exceptions, would be perverse and would encourage the adoption of draconian rules. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Beard* v. *Kindler*, No. 08-992, p. 28. A state *could* shut off its collateral review process to all delayed claims without regard to retroactive new rules subsequently created by this Court. However, such a rule would, at best, throw cases into federal court that could have been resolved in state court. Conceivably, such a rule might cut off relief altogether under 28 U. S. C.

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3. This point will be addressed further in our brief in *Wood* v. *Allen*, No. 08-9156, to be filed shortly after this brief.

§2254(d), if the original state-court decision was a reasonable application of the then-existing Supreme Court precedent, or under 28 U. S. C. §2244(b)(1), if the claim had been presented in a prior federal petition. Encouraging states to adopt such severe rules would be bad policy.

States should be permitted to make an exception to their timeliness and successive petition rules for *direct* application of retroactive new rules created by this Court without opening their judgments to renewed attack in federal court based on every attempt to *extend* this Court's recent precedents. The distinction between what *Roper* v. *Simmons*, 543 U. S. 551 (2005), dictates and whether its rule should be extended into new territory is important to a correct analysis of the jurisdictional problem in this case.

There is no dispute that *Roper* created a new rule, and that it "has been held to apply retroactively," see Rule 3.850(b)(2), to cases on collateral review in Florida state courts. See *Bonifay* v. *State*, 909 So. 2d 861, 861 (Fla. 2005). There should be no genuine dispute that *Roper* by its terms does not dictate extension of its rule to noncapital cases. See 543 U. S., at 568 (special considerations for capital punishment); *id.*, at 572 (explicit premise that life without parole remains available). To the extent that Sullivan argued to the state courts that it does, see J. A. 37, it would be an understatement to call that argument frivolous.

Caspari v. *Bohlen*, 510 U. S. 383 (1994), illustrates the point. Bohlen sought to extend a rule developed for capital cases in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), to noncapital cases. Without dissent on this point, the Court held that the capital-case holding of *Bullington* did not dictate its extension to noncapital cases, noting "the unique circumstances of a capital

sentencing proceeding." *Caspari, supra,* at 392.[4] "Even were [this Court] to agree with [Sullivan's] assertion that [its] decision[] in [*Roper*] inform[s], or even control[s] or govern[s], the analysis of his claim, it does not follow that [it] compel[s] the rule that [Sullivan] seeks." *Saffle* v. *Parks*, 494 U. S. 484, 491 (1990). Sullivan is seeking to create a new rule beyond *Roper*, not just the application of *Roper* to his case.

To the extent that the state court ruling is based on the determination that no existing precedent states the rule Sullivan seeks, that ruling is based on a federal-law premise, but it is a premise that is correct beyond genuine question. *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), contains broad language stating, "when a resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." In applying this precedent, one must recall the

> "maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399 (1821).

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4. The Court held that because the proposed rule would be new under *Teague* v. *Lane*, 489 U. S. 288 (1989), and the *Teague* issue had not been waived, the Court "had no occasion" to consider the merits. *Id.*, at 397. Justice Stevens, the lone dissenter, concluded the State had waived the *Teague* issue, *ibid.*, there was therefore no need to decide the *Teague* issue, *ibid.*, and he would rule for Bohlen on the merits. *Id.*, at 398. He did not express any disagreement with the conclusion that Bohlen's proposed rule would be new for the purpose of *Teague*.

The state rule at issue in *Ake* had an exception for all federal constitutional error, so the federal premise of the state-law ruling was precisely the merits of the question presented to this Court on certiorari. See 470 U. S., at 74-75. The question of whether a state-law ruling with a federal premise different from the merits precludes jurisdiction was not before the Court in *Ake*, and to the extent "some expressions are used which go far beyond" the question that was presented, they should not be considered controlling. *Cohens*, *supra*, at 400.

Fox Film Corp. v. *Muller*, 296 U. S. 207 (1935), involved a state-court ruling with a clearly correct federal premise. That case involved a contract with an arbitration clause that violated federal antitrust law. The state court decided that the clause was not severable from the remainder of the contract. The federal premise was clearly correct, based on a precedent of this Court striking down an identical clause, and severability was not a federal question. See *id.*, at 210. The Court therefore had no jurisdiction to decide another, disputed federal question that was not necessary to the judgment. See *id.*, at 211. *Ake* did not purport to overrule *Fox Film*, and the latter remains good law.

One difference between *Fox Film* and the present case is that in *Fox Film* the federal premise of the state-law ruling was expressly conceded, see *id.*, at 210, while in the present case the petitioner did make a frivolous argument contrary to that premise. See *supra*, at 8. That distinction should not make a difference. A party should neither be penalized for conceding a point where the law is clear nor rewarded for making an insubstantial argument to the contrary.

The jurisdictional question in this case therefore depends on whether the state court, in order to deny Sullivan's petition, needed to decide only that *Roper*

does not by itself dictate the rule that he seeks or whether it also needed to decide that *Roper* should not be extended to include the rule he seeks. The answer to that question depends on Florida law.

In *Tyler* v. *Cain*, 533 U. S. 656 (2001), this Court considered a similar provision of the federal successive petition statute, making an exception for a "claim [that] relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . ." 28 U. S. C. § 2244(b)(2)(A); *Tyler*, *supra*, at 659. The District Court was required to dismiss the claim because this Court had not yet made the precedent in question retroactive, and that was sufficient to decide the case in that court. See *Tyler*, *supra*, at 667. This Court also decided that it could not make the decision retroactive on review of the District Court's decision. *Id.*, at 667-668.

Florida Rule 3.850(b)(2), unlike the statute in *Tyler*, does not expressly say by whom the new rule has been "established . . . and has been held to apply retroactively," but the Florida Supreme Court has filled in the gap. Only rules created by this Court or the Florida Supreme Court can be retroactive on collateral review. See *Witt* v. *State*, 387 So. 2d 922, 930-931 (Fla. 1980); *Chandler* v. *Crosby*, 916 So. 2d 728, 729 (Fla. 2005) (*per curiam*).

To decide that the (b)(2) exception was inapplicable, the Circuit Court in this case needed only to decide that the right Sullivan sought had not yet been established by this Court or the Florida Supreme Court. The Circuit Court had no authority to extend *Roper* and make the extension retroactive. Nor did the Court of Appeal, so it was correct to summarily affirm. "Florida law precluded review by the state Supreme Court." Brief for Petitioner 4. The Court of Appeal is therefore

"the highest court of [the] State in which a decision could be had," 28 U. S. C. § 1257(a), and this Court's writ of certiorari runs to that court. If this Court cannot reverse a lower federal court that correctly dismissed a petition as procedurally barred based on existing law, as it held in *Tyler*, then surely it cannot reverse a state court in similar circumstances.

The judgments of the Circuit Court and the Court of Appeal in this case are independent of the federal question of whether *Roper* should be extended to noncapital, nonhomicide cases, the question presented in this Court. Those judgments depend only on the clearly correct determination that *Roper* itself does not establish such a rule.

The judgments below do not depend on any genuinely disputable federal question. Jurisdiction under 28 U. S. C. § 1257 is lacking.

II. The finality of an executed death sentence makes *Roper* v. *Simmons* fundamentally different from the present case.

Petitioners and supporting *amici* rely heavily on *Roper* v. *Simmons*, 543 U. S. 551 (2005), but there is a critically important difference between that case and this one. Once a death sentence is executed, neither an executive commutation nor a legislative repeal will have any effect. In contrast, a person sentenced to life without parole at the age of 17 will have decades to demonstrate that the predictions about him were wrong by leading an exemplary life in prison. Many Governors of Florida will come and go during Graham's life expectancy. If he behaves himself as a model prisoner, it is not unrealistic to expect one of them will grant clemency. *Harmelin* v. *Michigan*, 501 U. S. 957, 996 (1991) (opinion of the Court), noted that even a life-

without-parole sentence does not negate all possibility of release and distinguished capital punishment on that basis. To the extent that *Solem* v. *Helm*, 463 U. S. 277, 297 (1983), is inconsistent with this passage and implies that life without parole is in a special category comparable to capital punishment, *Solem* should be considered overruled.

For decades, we have heard the incessant drumbeat that death is different. See, *e.g.*, *Furman* v. *Georgia*, 408 U. S. 238, 306 (1972) (opinion of Stewart, J.). Suddenly and magically, it seems, death is no longer different. A sentence of life without parole is now described as a sentence "to die in prison." See, *e.g.*, Brief for Petitioner Sullivan 55. Is there no longer a difference of importance between the two sentences? If so, the entire "annually improvised Eighth Amendment, 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), is based on a false premise. The decades of litigation and millions of dollars spent disputing whether states have complied with it are pointless. If death is not different after all, the entire structure from *Furman* onward should be overruled.

But of course death is different. If the State of Missouri had executed Simmons, there would have been no opportunity for him to demonstrate rehabilitation and seek clemency. Graham and Sullivan face no such cutoff. Sullivan has already been in prison for nearly two decades. If he has been a model prisoner, he can apply for clemency now. If further advances in psychology ten years hence show us clearly who can be safely released, Graham and Sullivan will probably still be alive to receive the benefit if they qualify.

Roper, 543 U. S., at 574, noted that its categorical rule was subject to the "objection always raised against categorical rules." Indeed it was, and the objection is a

strong one. The objection is particularly strong when a litigant proposes to find a categorical rule in the Constitution that does not appear in the text and has not been found there in the two centuries since its enactment. For this Court to impose a categorical restriction and thereby remove the policy question from the people is a drastic step, to be reserved for drastic circumstances. In *Roper*, a bare majority of the Court decided to take that step despite a clear precedent to the contrary. See *id.*, at 556. It is debatable whether the Court should have gone that far, but it should go no further. *Roper* itself should be the end of this road.

III. The developmental psychology studies proffered by the mental health *amici* do not support a rigid constitutional cutoff at the 18th birthday.

An *amicus* brief has been filed in support of Petitioners by four mental health organizations: The American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, and Mental Health America. For brevity, we will refer to this as the APA Brief. The brief would make a powerful case if it were submitted on the question of whether *all* or *most* adolescents should be tried in adult court and subjected to adult penalties. That question, however, is not before this Court, and it probably never will be. The question is whether to draw a sharp line at the 18th birthday and declare permanently, as a matter of constitutional law, that *no one* less than 18 may *ever* be sentenced to life without

parole, at least for nonhomicides.[5] The science submitted in the APA Brief provides no support for that proposition.

The fallacy that lies throughout the APA Brief is its persistent lumping together of all adolescents into one group and all delinquent behavior, along with risky and impulsive behavior, into one construct. Not only is this not supported by the research the APA Brief cites, it is contradicted by that research.

The APA Brief obscures an important difference by smearing together different kinds of behavior. At pages 7-9, the brief puts emphasis on the greater propensity of teenagers to engage in risky behavior and notes that "risky behavior frequently includes criminal activity . . . ." *Id.*, at 7. The fact that two categories of behavior overlap does not mean they are the same. Skydiving is *risky*; drinking one beer at age 20 is *illegal*; forcible rape is *evil*. These categories are different in kind, and a greater propensity for one does not equal reduced culpability for another, even if some behaviors fall into more than one category.

After defining "adolescence" for the purpose of their brief as ending at 17, see APA Brief at 6, n. 3, *amici* claim, "Both violent crimes and less serious offenses 'peak sharply' in late adolescence—around age 17—and 'drop precipitously in young adulthood.' " APA Brief 8 (footnotes omitted). The inner quotes are from Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674, 675 (1993) (cited below as "Moffitt (1993)"), and refer to overall crime rates, *not* violent

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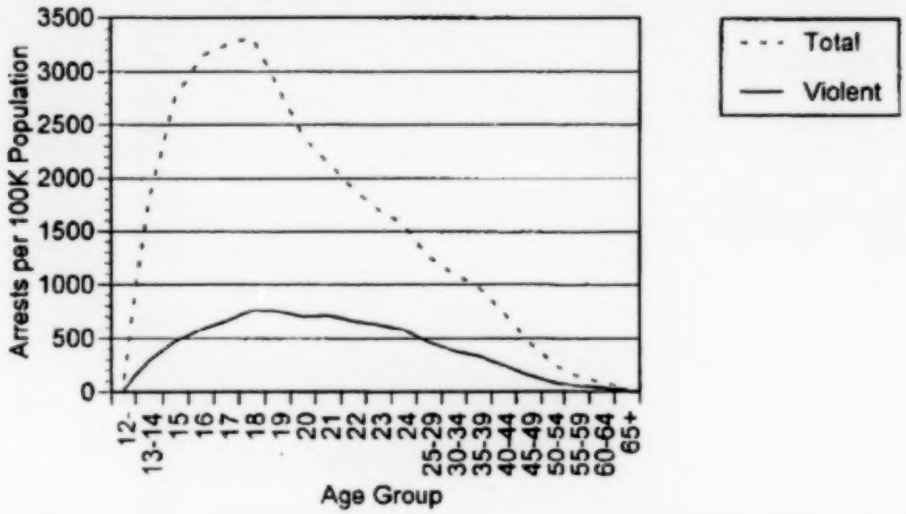
5. If petitioners prevail in these cases, the ink will not be dry on the opinion before the same forces are back claiming the same rule must apply to homicides.

crime rates. The rates for violent crime neither peak at 17, nor "drop precipitously in young adulthood."

Figure 1 shows arrest rates for crimes in the FBI's total and violent crime indices by age for 2001. See U. S. Dept. of Justice, Federal Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1993-2001, pp. 4, 6 (2003). The violent peak is at 18-19, the rates for those two ages being nearly equal. The decline in young adulthood is gradual. At age 22, the rate is about the same as at 17, and at age 24 it is about the same as at 16.

Figure 1. Total and Violent Crime Rates By Age, 2001



The age profiles of violent crime change across time and across cultures. Figure 2 shows the violent index crime arrest rates by age for 1965 and 2001.[6] Not only

6. The solid line in Figure 2 is the same as the solid line in Figure 1, although plotted on a different scale. The dashed line, for 1965, is computed from data in U. S. Dept. of Justice, Federal

was violent crime lower in 1965, but the age profile peaked later and remained nearly flat through the early 20s.

Figure 2. Violent Crime Rates By Age, 1965 and 2001

What accounts for the sharp increase in *total* offending in the teen years, with a sharp decline in adulthood, and the considerably less spiked rate of *violent* offenses in the same years? One widely credited explanation is that the teen years in Western cultures see a large increase "in the number of people who are willing to offend . . . ." Moffitt (1993) 675-676. The teen peak is caused by a large portion of the population that begins offending in the teen years and soon desists, but underneath the peak is another group that has been aggressive and antisocial from childhood and is likely to continue offending throughout the life course. See *id.*,

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Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1965-1985, pp. 3-33 (1986).

at 677-678. That underlying group commits a disproportionate share of the violent crimes.

Multiple longitudinal studies have confirmed the pattern. See Moffitt, A Review of Research on the Taxonomy of Life-Course-Persistent Versus Adolescence-Limited Antisocial Behavior 277, 292-293, in Taking Stock: The Status of Criminological Theory (F. Cullen, J. Wright & K. Blevins eds. 2006). Moffitt's findings come from a longitudinal study in Dunedin, New Zealand. The group that began delinquent behavior in adolescence generally committed nonviolent offenses, while the group that began serious, aggressive misbehavior in childhood was more likely to commit violent offenses. *Ibid.* Another longitudinal study in Canada similarly found that violence in adolescence was typically part of a long-term pattern of behavior. See Brame, Nagin, & Tremblay, Developmental Trajectories of Physical Aggression from School Entry to Late Adolescence, 42 J. Child. Psychiatry 503, 510 (2001).

Cross-cultural comparisons are also revealing. In preindustrial societies where teenagers are treated as adults, the increase in delinquent behavior among young males is either extremely mild or completely absent. See R. Epstein, The Case Against Adolescence: Rediscovering the Adult in Every Teen 81 (2007). It is when societies become Westernized that adolescent delinquency rises. See *id.*, at 81-85. This variation confirms that the high rates of crime among adolescents is not inherent or biological, but rather a product of culture or the interactions of biology and culture.

The APA Brief, at 22-27, also claims physical immaturity of the teen brain as a reason for risk-taking and

poor judgment.[7] However, individuals mature at different rates, and if the immature brain hypothesis were true, one would expect that among individuals of the same age, brain maturity would be negatively correlated with dangerous behavior. A recent study finds just the opposite. See Berns, Moore, & Capra, Adolescent Engagement in Dangerous Behaviors Is Associated with Increased White Matter Maturity of Frontal Cortex, 4 PLoS ONE 9, http://www.plosone.org/article/info:doi/10.1371/journal.pone.0006773.

These "results are consistent with the maturity gap theory." *Id.*, at 9. The rise of dangerous and delinquent behavior in the teen years is not because of immature brains but the result of society treating physically mature young people as if they were children, denying them adult responsibility and status. See Epstein, The Myth of the Teen Brain, Scientific American Mind 63 (April/May 2007). Treating teenagers like children is the problem, not the answer, for most teens. According to Moffitt, the maturity gap is a major reason for the short-lived delinquency of the larger, less serious group of teen offenders, and they grow out of it. See Moffitt (1993) 687, 690. A smaller group does not.

The argument of the APA Brief varies from the science that it cites in its assertion that adolescents must be treated as one indistinguishable mass. "Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not." APA Brief 4. Yet the APA Brief relies heavily on the work of Terrie Moffitt, see *id.*, at 8, 20,

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7. As discussed *supra*, at 15, an additional problem with this argument is equating risky behavior and poor judgment with deliberate acts of harm to others.

and the central theme of Moffitt's work is that adolescents are *not* a homogenous mass. Rather, "delinquency conceals 2 distinct categories of individuals, each with a unique natural history and etiology." Moffitt (1993) 674.

According to Moffitt's theory, there are multiple subgroups with different patterns of offending. The two with the highest rates of offending during adolescence are termed the adolescence-limited (AL) group and the life-course-persistent (LCP) group. The AL group, in this theory, is likely to desist from offending in young adulthood, while the LCP group is not. See Moffitt, *et al.*, Childhood-Onset Versus Adolescent-Onset Antisocial Conduct Problems in Males: Natural History from Ages 3 to 18 Years, 8 Dev. & Psychopathology 399, 400 (1996) (cited below as "Moffitt (1996)"). Follow-up research required a modification of the theory. The AL group continued property offenses into adulthood but had a significantly lower rate of violent offenses. See Moffitt, Caspi, Harrington, & Milne, Males on the Life-Course-Persistent and Adolescence-Limited Antisocial Pathways: Follow-up at Age 26 Years, 14 Dev. & Psychopathology 179, 187 (2002).

Contending that adolescents who will desist are indistinguishable from those who will not, the APA Brief cites several sources that only tangentially support that proposition, see APA Brief at 21, while ignoring the body of work they relied on the page before. See *id.*, at 20. The first source the APA Brief cites is Mulvey and Cauffman, The Inherent Limits of Predicting School Violence, 56 Am. Psychologist 797 (2001). As the title of their article implies, Mulvey and Cauffman address the problem of predicting which high schools students will commit acts of violence such as the Columbine massacre. See *id.*, at 797. Predicting

which adolescents among those who have already committed an act of great violence will do so again as adults is not their concern. The paragraph cited by the APA Brief, see *id.*, at 798-799, notes the changing nature of youth in passing to support the point that instruments designed for adults may be inappropriate. The passage provides little or no support for the proposition that identification of likely recidivists among known violent adolescent offenders is inherently impossible.

Thomas Grisso, Double Jeopardy: Adolescent Offenders with Mental Disorders 64-65 (2004), discusses identification of mental disorders. In particular, this passage discusses whether mental states of mood or anger observed by a clinician are stable enough to form the basis of a diagnosis. However, diagnosis according to the DSM and evaluation of criminal culpability are different matters. See American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders, Cautionary Statement, p. xxvii (4th ed. 1994). Other research indicates that mental states such as anger are indeed poor predictors of future violence, but the variety of crimes a juvenile commits and the age at which he begins are much better predictors. See Vitacco, Caldwell, Van Rybroek, and Gabel, Psychopathy and Behavioral Correlates of Victim Injury in Serious Juvenile Offenders, 33 Aggressive Behavior 537, 541 (2007).

Edens, Skeem, Cruise, and Cauffman, Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review, 19 Behav. Sci. Law 53 (2001), is a technical article discussing the validity for use with juveniles of various instruments for assessing psychopathy. The page cited by the APA Brief, see *id.*, at 59, discusses the age-inappropriateness of some of the items on one instrument, the PCL-R, that is the

"gold standard" for use with adults. See *id.*, at 54. For example, one need not be a psychologist to know that "grandiose sense of self-worth," see *id.*, at 59, is a characteristic many teenagers have and most grow out of. The fact that this characteristic is associated with psychopathy in adults does not mean that it is similarly associated in adolescents.

The Edens article supports the proposition that existing measures of psychopathy are not sufficiently validated for courts to use in sentencing minors. See *id.*, at 74. It does not support the proposition that there is no subgroup of adolescents too dangerous to ever release from prison or that such a subgroup is inherently indistinguishable from the mass, no matter what tools we may develop in the future.

The body of research on "life-course persistent" offenders points in the other direction. According to Moffitt and her colleagues, the AL and LCP groups *are* distinguishable, and they are distinguishable in ways known to the criminal/juvenile justice system.

It is true that the AL and LCP groups are not distinguished by broad measures of antisocial behavior taken in midadolescence. See Moffitt (1996) 409. It is also true that in Moffitt's study the two groups did not differ on number of convictions in adolescence or age of first arrest or conviction. See *id.*, at 413-414. However, the theory predicted "they should differ on convictions for violence," *id.*, at 412, and indeed they did, with a highly significant $p<.01$.[8] See *id.*, at 414. The LCP group was three times as likely to be convicted of a

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8. The p statistic represents the probability that an observed result could have happened by chance. The lower the p, the more conclusively the random chance possibility is negated. A result with p less than .05 is regarded as "statistically significant."

violent offense before age 18 as the AL group, and six times as likely as the average of the total sample. See *id.*, at 413, Table 2. This increased level of violence persists into adulthood. See Moffitt (2006) 293. This research is consistent with common sense. The first step toward identifying the incorrigibles is simply to separate the rapists and armed robbers from the shoplifters and joyriders. The second step is to separate the repeaters from those who have committed only one serious offense.

Roper v. *Simmons*, 543 U. S. 551, 570 (2005), noted that "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." It may be less supportable to draw that conclusion from a single crime as the only evidence, but that does not mean that no one under 18 is "irretrievably depraved." "Interventions with life-course-persistent persons have met with dismal results . . . . The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18 . . . ." Moffitt (1993) 684 (citations omitted).

Incorrigibles do exist. Whether the present state of knowledge permits identification of persistent offenders with the degree of certainty required for a psychiatric diagnosis is beside the point. This Court is being asked to lay down a constitutional mandate that can only be overturned by the drastic measure of amending the federal Constitution. The limitations of knowledge of the moment provide a reason to refrain from such a step, not a reason to take that step. The potential consequences of error here are not to be taken lightly.

The kidnapping of 11-year-old Jaycee Lee Dugard and her 18-year imprisonment provide a cautionary tale of how parole decisions can go horribly wrong, with

devastating consequences for innocent people. See Lane, How Jaycee Lee Dugard's Tormentor Got Out, http://voices.washingtonpost.com/postpartisan/2009/09/how_jaycee_lee_duggards_tormen.html. Phillip Garrido was sentenced to 50 years for a prior kidnapping in which he committed repeated sexual assaults on the victim for hours. Yet he was back on the street in only 11 years, and the unimaginable ordeal for Jaycee was the result.

The question of where to strike the balance between the risk of release for innocent people and the need to offer a second chance to offenders is not an easy one. There is no clearly correct answer.

Blackstone noted that ancient Saxon law had fairly rigid age categories.

> "But by the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is that '*malitia supplet aetatem*.' "[9] 4 W. Blackstone, Commentaries 23 (1st ed. 1769).

Sullivan's extensive criminal record compiled by the age of 13 demonstrates the continuing truth of Blackstone's observation. Does the science to date require a rejection of this wisdom and reversion to the pre-Edward III approach of rigid categories based solely on chronological age? No, it does not, and the APA *amici* come close to admitting as much. See APA Brief 6, n. 3.

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9. Malice supplies age.

No one disputes that minors generally should be treated differently from adults. However, the extent to which we should use minimum-age cutoffs versus individual assessment is one of policy. This policy question is one of the many that the Constitution leaves to the people of the several States, not one of the few it has removed from them. See U. S. Const., Amdt. 10. This Court need not endorse Florida's sentencing policy. See *Harmelin* v. *Michigan*, 501 U. S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment). It need only recognize where the authority to make the decision lies. Proposals for change should be addressed to the legislature.

CONCLUSION

In *Graham*, the judgment of the Florida District Court of Appeal should be affirmed. In *Sullivan*, the writ of certiorari should be dismissed for lack of jurisdiction.

September, 2009

Respectfully submitted,

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AMICUS CURIAE BRIEF

133

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Nos. 08-7412, 08-7621

In the Supreme Court of the United States

Terrance Jamar Graham,

Petitioner,

v.

State of Florida,

Respondent.

Joe Harris Sullivan,

Petitioner,

v.

State of Florida,

Respondent.

On Writs of Certiorari to the First District Court of Appeal of Florida

BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. Life Without Parole Is An Unconstitutionally Disproportionate Punishment Because Juveniles Are Less Morally Culpable 6

B. The High Prevalence Of Disabilities Among Juvenile Offenders Makes Judicial Assessment Of Their Culpability Insufficiently Reliable To Support Irrevocable Punishment 8

1. Juveniles With Disabilities Are Disproportionately Affected By The Criminal Justice System 9

2. Sporadic Recognition Of Juvenile Disability Further Impedes The Reliable Assessment Of Juvenile Culpability 12

3. Juveniles With Disabilities Are Systematically Disadvantaged In Their Dealings With The Criminal Justice System 15

C. The Presence Of Disability Exacerbates The Unconstitutional Disproportionality Of Juvenile Life-Without-Parole Sentences 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

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BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS [1]

INTEREST OF THE *AMICUS CURIAE*

The Disability Rights Legal Center (DRLC) is a non-profit organization dedicated to promoting the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services. DRLC accomplishes its mission through many programs, including the Cancer Legal Resource Center (a joint program with Loyola Law School), the Education Advocacy Program, the Education and Outreach Program, and the Civil Rights Litigation Program. Since 1975, DRLC has handled countless disability rights cases under state and federal civil rights laws challenging discriminatory practices by government, business, and educational institutions.

DRLC has a particular interest in juvenile justice issues. DRLC provides legal advocacy to ensure that at-risk youth receive appropriate general and special education services in their community, thereby reducing the likelihood that they will one day become involved in the juvenile and adult justice systems. Because early intervention is far from comprehensive, a large proportion of youth who do become in-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief are filed with the Clerk's office.

volved in the juvenile delinquency system have undetected learning-related disabilities. DRLC's Juvenile Justice Section accordingly works to ensure that court-involved youth with special education needs receive appropriate education and related services. DRLC supports criminal justice policies that recognize the special needs of juveniles and the factors that uniquely affect their culpability. It therefore opposes the imposition of life-without-parole sentences on juveniles whose offenses were committed before the age of 18.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sending children to prison for life without parole violates the Eighth Amendment because the practice is both cruel and unusual. It is grossly disproportionate to juvenile culpability, especially for nonhomicidal crimes like those at issue here. It is exceptionally unusual in modern society. And it is unusually cruel in light of the offender's extreme youth, which more often than not is accompanied by a developmental disability.

A juvenile sentence of life without parole is as final and irrevocable as a juvenile death sentence. It condemns the juvenile to die in prison as surely as a death sentence; under both sentences the juvenile enters prison as a shackled teenager and decades later leaves in a pine box. The sole difference is that in life without parole the State awaits the death, rather than inflicts it. But a sentence of life without parole, just as certainly as a death sentence, forecloses any prospect of personal rehabilitation or societal reentry, and accordingly should be reserved for the very worst of offenders, those whose prior culpability is unquestionable and whose future rehabilita-

tion inconceivable. The same considerations that led this Court to find juvenile executions unconstitutional in *Roper* v. *Simmons*, 543 U.S. 551 (2005), and *Thompson* v. *Oklahoma*, 487 U.S. 815 (1988), render the sentence here beyond the scope permitted by the Eighth Amendment.

Although children should be held accountable for their crimes, it does not follow that they should be punished identically to adults. Society has long distinguished among the rights, privileges, and burdens of adults and children. See Br. for Pet. in No. 08-7621, App. A. Children are not miniature adults but rather are fundamentally different. They are more impulsive and less able to assess the risks and consequences of their actions. Moreover, because children are not neurologically complete, they are far less likely to be truly hardened criminals. Thus, children have a greater potential for rehabilitation. The constitutional limits on their punishment should reflect those inherent differences.

This brief explains how juveniles' special susceptibility to emotional, psychological, and learning-related disabilities affects the constitutional limits on their sentencing. Juveniles with serious emotional, psychiatric, and learning-related brain disabilities are significantly overrepresented in the incarcerated population. Juveniles suffering from serious disabilities, moreover, are likely to be particularly disadvantaged at every stage of their dealings with the criminal justice system. When their disabilities are unrecognized, as is often the case, these problems intensify. The cases before this Court are illustrative—both Graham (in No. 08-7412) and Sullivan (in No. 08-7621) have substantial disabilities, yet there is no evidence that their disabilities re-

ceived any consideration at sentencing. And the disproportionality of a sentence of life without parole is especially pronounced for juveniles with disabilities, given the realities of long-term incarceration in facilities where harsh and austere conditions purposely tax the most hardened adult inmate; those same conditions aggravate existing juvenile deficits.

The high frequency of disabilities in juveniles involved in the criminal justice system further impedes the reliable assessment of juvenile culpability. Consequently, any irrevocable assessment of culpability is necessarily unsound and a lifelong sentence unconstitutionally excessive. The discredited notion that juveniles are merely adults in training and thus should be subject to the same punishment should be laid to rest. As this Court has recognized, juveniles, and especially juveniles with diminished capacities, present different issues of culpability entirely. Because the nature and the assessment of juvenile culpability make final and irrevocable judgments irrational, a sentence to a juvenile of life without parole for a non-homicidal offense exceeds constitutional limits in the same way as a death sentence for a juvenile who commits a homicide.

ARGUMENT

A wealth of psychosocial and neurological research shows that juveniles differ from adults in numerous ways that reduce their moral culpability. These developmental limitations and deficiencies are magnified when disability is a factor. It is therefore unsurprising that juveniles with disabilities are overrepresented (and fare especially poorly) in the criminal justice system. This fact illuminates the fundamentally mistaken assumption about juvenile culpability that underlies juvenile sentences of life

without parole: namely, that it is possible to conclude that a juvenile—in these cases a 17-year-old and a 13-year-old, in another perhaps a 10-year-old—is wholly unredeemable and should, for that reason, be permanently banished from free society.[2] To the contrary, the defining characteristic of juvenile personality is its transience. All juveniles mature, and the control that comes with maturity can check the transgressive influences of disability—influences that are particularly pronounced on the still-forming juvenile psyche. A sentence of life without parole presumes irreparable corruption when in fact juvenile offenders are immature, often have disabilities, act impulsively, and—above all—are still in the process of growing into the adults they eventually will become. For that reason, this Court observed, "it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent." *Thompson* v. *Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (plurality op.). A punishment that imprisons a juvenile until death rests on an equally unsound premise, and therefore is unconstitutionally disproportionate.

As this Court repeatedly has acknowledged, even normal children are less culpable for their actions than adults and therefore less deserving of the most severe criminal punishments. The presence of a disability further reduces the blameworthiness of juvenile offenders. And the very nature of a disability often impairs the evaluation of a juvenile's moral cul-

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[2] Children as young as 10 or still younger are at risk from the sentencing practice challenged here. Under Florida law, a "child of *any age* who is charged with" a major crime may be "*tried and handled in every respect as an adult*." Fla. Stat. Ann. § 985.56(1) (emphasis added.)

pability. Thus, the extraordinarily high prevalence of disability—both recognized and undiagnosed—among juvenile offenders is an additional reason that a sentence of life without parole is categorically disproportionate for any juvenile.

A. Life Without Parole Is An Unconstitutionally Disproportionate Punishment Because Juveniles Are Less Morally Culpable.

As this Court recognized over a quarter-century ago, "[e]ven the normal 16-year-old customarily lacks the maturity of an adult." *Eddings* v. *Oklahoma*, 455 U.S. 104, 116 (1982). More recently, in *Roper* v. *Simmons*, 543 U.S. 551 (2005), the Court identified three broad differences between juveniles and adults that preclude the constitutional application of the death penalty to minors. These differences—each supported by substantial research—render equally unconstitutional the imposition of sentences of life without parole for non-homicidal offenses.

First, juveniles do not have the same capacity as adults for mature reasoning, risk assessment and impulse control; therefore, "impetuous and ill-considered actions and decisions" are "more understandable among the young." *Roper*, 543 U.S. at 569 (internal quotation marks omitted).[3] Second, "juve-

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[3] See, *e.g.*, *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988) (plurality op.); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psych. 257, 264-270 (2001); Reed Larson et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. Youth & Adolescence 469, 488 (1980).

niles are more vulnerable or susceptible to negative influences and outside pressures. * * * This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[4] *Ibid.* Finally, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[5] *Id.* at 570.

These categorical developmental deficits combine to "render suspect any conclusion that a juvenile falls among the worst," or most morally culpable of offenders. *Roper*, 543 U.S. at 570. For that reason, the consensus of modern society has rejected imposition of a sentence of life without parole on a juvenile, as the briefs for the petitioners explain. Accordingly, for the reasons more fully explained in those briefs and in the briefs of other *amici* supporting the petition-

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The remarks at sentencing in No. 08-7412, *Graham* v. *Florida*, reflect a contrary understanding of juveniles' developmental characteristics. In the court's view, Graham had "*decided*" that an "escalating pattern of criminal conduct" was "how [he was] going to lead [his] life" and remarked that it was "unfortunate that [he] made that *choice*." No. 08-7412, J.A. 394 (emphasis added). By contrast, as noted above (at p. 5), this Court rejected the notion that a juvenile sentence may be constitutionally predicated on the notion of "a fully rational, choosing agent." *Thompson*, 487 U.S. at 825 n.23.

[4] See, *e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 593 (1992); *Thompson*, 487 U.S. at 835; Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 33, 47-48 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[5] See, *e.g.*, Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000).

ers, such sentences are grossly disproportionate and therefore unconstitutional.

B. The High Prevalence Of Disabilities Among Juvenile Offenders Makes Judicial Assessment Of Their Culpability Insufficiently Reliable To Support Irrevocable Punishment.

The interplay among youth, disability, and delinquency underscores why juvenile life-without-parole sentences cannot withstand *Roper's* constitutional test. The high prevalence of disabilities among the delinquent youth population means that a large number of juveniles facing life without parole will have a disability.[6] Yet juveniles with disabilities are disadvantaged at every stage of their encounters with the criminal justice system. Indeed, disability often goes unrecognized, making it impossible to adequately consider its effect on the already reduced moral culpability of juveniles. Coupled with the inherent unreliability of judgments about juvenile culpability—which, as *Roper* recognized, stems from the fact that juvenile character is a work in progress—the distorting effect of widespread disability makes it inappropriate to sentence a juvenile to imprisonment until death.

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[6] For example, Graham, the petitioner in No. 08-7412, "most likely suffered a form of crack addiction at birth" (both parents were long-term crack addicts), No. 08-7412, J.A. 448, had long-term depression, *id.* at 446, 448, and suffered from ADHD, for which his mother refused the prescribed treatment. *id.* at 447. Sullivan, the petitioner in No. 08-7621, has a mental disability and, at age 13, read at a first-grade level. See No. 08-7621, J.A. 26 & Pet. Reply 7.

"[T]he signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570 (internal quotation marks omitted). A sentence of life without parole irrevocably presumes the contrary, even though experience and science show that the volatile mix of youth and disability responsible for so much delinquent behavior among juveniles will fade in the fullness of time.

1. Juveniles With Disabilities Are Disproportionately Affected By The Criminal Justice System.

Incarcerated youth are significantly more likely to have a mental disorder than the general population of teens.[7] "[T]he general consensus" is that between 70 and 100 percent of "incarcerated youth meet [the] formal [diagnostic] criteria for at least one * * * disorder," with "approximately 20% of youth meeting diagnostic criteria for a serious mental health disorder—defined as serious emotional disturbance resulting in functional impairment." Candice L. Odgers et al., *Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles*, 14 Can. Child Adolescent Psych. Rev. 26, 27 (2005). By comparison, the prevalence of *any* disorder in the general youth population is approximately 1 in 3,

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[7] See Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 J. Am. Acad. Child Adolescent Psych. 1010, 1016 (2008) (youth in prison are between 2 to 20 times more likely to have mental disorders than age-equivalent youth in the general population); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 Pediatrics 286, 289 (2000).

with only 1 in 10 youth meeting the criteria for a serious one. *Ibid.*

Three recent studies across five States provide compelling evidence of the high rate of mental disabilities among juveniles in the criminal justice system. Nearly 60% of male youths arrested in Cook County, Illinois, and over two-thirds of the females, met the diagnostic criteria for a psychiatric disorder. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 Archives Gen. Psych. 1133, 1137 (2002). Similar figures were reported in a study of over 1,400 youthful offenders from Louisiana, Texas, and Washington. Jennie L. Shufelt & Joseph J. Cocozza, Nat'l Ctr. For Mental Health And Juvenile Justice, *Youth With Mental Health Disorders In The Juvenile Justice System: Results From A Multi-State Prevalence Study* 2 (2006) (over 70%). And a study of incarcerated juveniles in Maryland found that more than half met the diagnostic criteria for a psychiatric disorder. Deborah Shelton, *Emotional Disorders in Young Offenders*, 33 J. of Nursing Scholarship 259, 262 (2001). Put simply, youth detained in "correctional facilities have levels of psychopathology similar to the levels of mental illness found in psychiatric hospitals." *Id.* at 259. Moreover, the youngest juvenile offenders—those, like Sullivan, between the ages of 12 and 14—who met the diagnostic criteria for more than one disability had "significantly more serious criminal behavior," underscoring the synergistic effects of disability and pronounced immaturity. *Id.* at 261.

There is a likewise strong relation between juvenile incarceration and learning-related disabilities, which are relatively common in the imprisoned juvenile population. See Mary M. Quinn et al., *Youth*

with Disabilities in Juvenile Corrections: A National Survey, 71 Exceptional Children 339, 342 (2005). Learning disabilities predispose youth toward involvement in the criminal justice system.[8]

"[S]tudies typically suggest that approximately 10 percent of general population youth have a special education disability, compared with between 30 and 50 percent of incarcerated youth." Daniel P. Mears & Laudan Y. Aron, Urban Institute Justice Policy Center, *Addressing The Needs of Youth With Disabilities in the Juvenile Justice System: The Current State of Knowledge* § 5.3 (2003). One national study found that during the 2000-2001 school year, 33.4% of students in juvenile correction institutions received special education services compared to 8.8% of students in the general population. Quinn, *supra*, 71 Exceptional Children at 342.[9] Other studies have found disparities of more than five to one. See Tamara Zenz

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[8] The link between academic underachievement and delinquency is firmly established. See, *e.g.*, Norman Brier, *The Relationship Between Learning Disability and Delinquency: A Review and Reappraisal*, 22 J. Learning Disabilities 546, 546 (1989); Carolyn G. Grande, *Delinquency: The Learning Disabled Student's Reaction to Academic School Failure?*, 23 Adolescence 209, 212 (1988); see generally ABA Juvenile Justice Center, *Special Ed Kids In The Justice System: How To Recognize and Treat Young People with Disabilities that Compromise Their Ability To Comprehend, Learn, and Behave* 2 (Lourdes M. Rosado ed., 2000) (estimating that 18% of those with an intellectual disability, 31% of those with a specific learning disability, and 57% of youth with a behavioral disorder will be arrested within five years of leaving high school).

[9] These figures likely understate the actual prevalence of learning disabilities because they reflect only those individuals already diagnosed with a disability and being provided with services or treatment. *Ibid.*

& George Langelett, *Special Education in Wisconsin's Juvenile Detention System*, 55 J. Corr. Educ. 60, 63 (2004) (61% of juveniles incarcerated in Wisconsin received special education services, compared to 11.77% of the students in the public school system).

2. Sporadic Recognition Of Juvenile Disability Further Impedes The Reliable Assessment Of Juvenile Culpability.

Because of their developmental characteristics, the culpability of juveniles never rises to the level that would justify a life-without-parole sentence. But even if an exceedingly "rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity" (*Roper*, 543 U.S. at 572), to deserve such a harsh sentence, the confounding facts of youth make the reliable identification of such exceptional offenders impossible. As this Court has recognized, the professional norms of psychiatrists forbid them from diagnosing any patients under 18 with antisocial personality disorder, because even experienced mental health professionals find it difficult to distinguish between "unfortunate yet transient immaturity" and "irreparable corruption" in juveniles. *Id.* at 573. A lay judge or lay jury cannot be expected to do better, and cannot constitutionally be entrusted with that task when the stakes place a child's life beyond redemption.

The difficulty of accurately diagnosing mental and psychiatric disorders in juveniles further precludes the constitutional imposition of an immutable punishment. Diagnosing mental disabilities in juveniles is difficult even for mental health professionals. See, *e.g.*, Jay A. Sevin et al., *Psychiatric Disorders in Adolescents with Developmental Disabilities: Longi-*

tudinal Data on Diagnostic Disagreement in 150 Clients, 34 Child Psych. & Hum. Dev. 147, 161 (2003) (over a 10 year period, the individuals studied received an average of 5 different diagnoses and 7 different medications). The broad variability of symptoms is unsurprising, "given that the disorder is superimposed on a developing child that has yet to achieve emotional, cognitive, neuropsychological, and physical maturity." Margaret A. Bowring & Maria Kovacs, *Difficulties in Diagnosing Manic Disorders Among Children and Adolescents*, 31 J. Am. Acad. Child. Adolescent Psych. 611, 612 (1992). In addition, "the high rate of comorbidity across psychiatric diagnoses" in juveniles "poses a particularly difficult problem" for diagnosis. Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 J. Am. Acad. Psych. & Law 204, 206 (2006); see also Gabrielle A. Carlson, *The Challenge of Diagnosing Depression in Childhood and Adolescence*, 61 J. Affective Disorders 3, 3, 5 (2000).[10]

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[10] Juvenile disabilities have high comorbidity, meaning that the majority of youth who met the diagnostic criteria for one mental health disorder also met the criteria for other, distinct, mental health disorders. Shufelt & Cocozza, *supra*, *Youth With Mental Health Disorders* at 3 (79% of juveniles with at least one disorder met the criteria for two or more disorders, and over 60% of juveniles with at least one disorder were diagnosed with three or more). Mental health disorders are also highly correlated with substance abuse disorders. *Ibid.* (among youth with a mental health disorder, 61% met the criteria for a substance use disorder); see also Lisa H. Jaycox et al., *Mental Health and Medical Problems and Service Use Among Adolescent Substance Users*, 42 J. Am. Acad. Child Adolescent Psych. 701, 701 (2003) (almost two-thirds of sample in substance abuse program had at least one comorbid mental health disorder).

Undiagnosed disabilities are substantially likely to remain undiagnosed throughout a juvenile's tenure in the criminal justice system. To begin with, in many cases, the educational system—the first line of defense in identifying many juvenile disabilities—has already failed in that task. Su-chin Serene Olin & Kimberly Hoagwood, *The Surgeon General's National Action Agenda on Children's Mental Health*, 4 Current Psych. Rpts. 101, 102-103 (2002); cf. 20 U.S.C. § 1412(a)(3) (requiring, pursuant to the Individuals with Disabilities Education Act, that every State "identif[y], locate[], and evaluate[]" all "children with disabilities residing in the State").[11] Second, minority youth and youth of low socioeconomic status (who are at greater risk of involvement with the justice system) are more likely to have unmet mental health needs. Andres J. Pumariega et al., *Utilization of Mental Health Services in a Tri-Ethnic Sample of Adolescents*, 34 Cmty. Mental Health J. 145, 146-147, 155 (1998). Third, "transfer of school records to juvenile court and correctional facilities" is "inconsistent to nominal," making it easy for juveniles with disabilities to fall through the cracks. Mears & Aron, *supra*, § 5.3; Peter E. Leone et al., *Understanding the Over Representation of Youths with Disabilities in Juvenile Detention*, 3 D.C.L. Rev. 389, 397 (1995). Fourth, even though intake screen-

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[11] See also Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 29-33 (2003) (recalling how "Dale," despite failing kindergarten and first, second, and third grades, was never referred for evaluation until he was 15 and facing an armed assault charge, at which point he was diagnosed with mild mental retardation and a severe emotional disturbance).

ing procedures have improved, "assessment practices in juvenile justice settings remain highly variable and generally have not used evidence-based, scientifically sound instruments." Gail A. Wasserman et al., U.S. Dep't of Justice, Office of Justice Programs, Juvenile Justice Bulletin, *Assessing the Mental Health Status of Youth in Juvenile Justice Settings* 1 (2004).

All in all, it is unsurprising that a "[h]igh prevalence of both undiagnosed and untreated physical and mental health problems have been reported" for incarcerated juveniles. Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 J. Am. Acad. Child Adolescent Psych. 1010, 1010 (2008). The prevalence of undiagnosed disability among juveniles casts additional doubt on the criminal justice system's ability to reliably assess juvenile culpability. Only a categorical rule precluding the imposition of life-without-parole sentences on juveniles can acceptably contain the risk of permanently and disproportionately punishing juveniles with limited culpability.

3. Juveniles With Disabilities Are Systematically Disadvantaged In Their Dealings With The Criminal Justice System.

Juveniles face distinctive challenges in the criminal justice system. Among juvenile offenders, "approximately one third of 11- to 13-year olds, and * * * one fifth of 14- to 15-year olds are" so "impaired in capacities relevant to adjudicative competence" that, if they were adults, they "would likely be considered incompetent to stand trial." Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison*

of Adolescents' and Adults' Capacities as Trial Defendants, 23 Law & Hum. Behav. 333, 356 (2003). Even juveniles who are technically competent to stand trial, however, are at a disadvantage on account of the diminished decision-making abilities characteristic to youth. See *Roper*, 543 U.S. at 569.

The high prevalence of disabilities among delinquent juveniles makes these problems worse. Setting aside the diminished moral culpability of juveniles as a class, there is a real risk that sentences of life without parole are not limited to only the "worst" juvenile offenders. Juveniles with disabilities are at a significant disadvantage at every stage of the criminal justice system. See *Roper*, 543 U.S. at 569. In holding that the death penalty could not constitutionally be imposed on defendants with mental retardation, this Court noted the increased "possibility of false confessions" by individuals with intellectual disabilities, and observed that those persons:

> may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crime.

Atkins v. *Virginia*, 536 U.S. 304, 320-321 (2002). The same problems impair adjudication of the youth offender with disabilities. The effects of youth operate in synergy with the effects of disability, leaving juveniles with disabilities critically vulnerable at every stage of the criminal justice system: interrogation and arrest, trial, and sentencing.

Juveniles generally are more prone than adults to false confessions. See Grisso, *supra*, 23 Law & Hum. Behav. at 357; Steven A. Drizin & Richard A.

Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 1005 (2004). That is because juveniles are both more compliant and more suggestible in the face of pressure by perceived authority figures.[12] The problem of false confessions not only affects the likelihood of inappropriate guilty pleas, but also increases the risk of wrongful convictions at trial, which necessarily results in a disproportionate sentence.[13] Grisso, *supra*, 23 Law & Hum. Behav. at 357. And juveniles with disabilities may be even more susceptible to making false confessions. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 446 (1985).

Similarly, when even "normal" juveniles have difficulty comprehending the *Miranda* warnings, see Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134, 1160 (1980), "[a] child with demonstrable language-based disabilities typically cannot under-

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[12] Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 Law & Hum. Behav. 141, 151 (2003); Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of Miranda*, 18 Am. J. Forensic Psychol. 17, 24 (2000); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997).

[13] It is therefore unsurprising that adolescents make up a large proportion of the known cases of false confessors. In a survey of 125 defendants found guilty on the basis of a false confession and later exonerated, the authors found that fully *one-third* were juveniles. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004).

stand the *Miranda* warnings * * *" at all.[14] See Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 46).[15]

These comparative disadvantages persist into the trial phase. In a series of simulated vignettes based on decisions commonly encountered in the criminal justice system, like "disclosing information during consultation with a defense attorney" or "responding to a plea agreement for reduced consequences in exchange for a guilty plea and testimony against other defendants," younger juveniles systematically made worse choices than their older counterparts.[16] Grisso, *supra*, 23 Law & Hum. Be-

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[14] At 13, Sullivan read at a first-grade level (No. 08-7621, Pet. Reply 7), whereas "[t]he *Miranda* warning itself has been evaluated to be at a 7th grade level of reading and listening difficulty." Joan Petersilia, California Policy Research Center Report Series, *Doing Justice? Criminal Offenders with Developmental Disabilities* at 13 (2000).

[15] The underdiagnosis of disability in juvenile defendants can also result in overlooked defenses. For example, a juvenile's disability "may be relevant to * * * establishing a *Miranda* violation by police." Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 44.

[16] Juveniles must rely on counsel to safeguard their interests (see *In re Gault*, 387 U.S. 1, 38 n.65 (1967)), a faith that is unfortunately often misplaced. Sullivan's trial lasted a single day. No. 08-7621, J.A. 4-5. Based largely on testimony from his older co-defendants and a suggestive voice identification by the victim that trial counsel did not effectively challenge—but no visual identification, physical, or DNA evidence (indeed, the DNA material was destroyed by the State in 1993)—Sullivan was convicted of sexual assault. *Id.* at 24, 26; *id.* Pet. Reply 6 & n.9. Trial counsel filed no written pleadings following Sullivan's conviction, and his remarks at sentencing fill less than a page of transcript. Sullivan's appointed appellate counsel filed an *Anders* [v. *California*, 386 U.S. 738 (1967)] brief indicating his

hav. at 340, 351-352. Juveniles with disabilities are even less able to participate in and make effective decisions regarding their own defenses. See Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 49-51; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 13-14 (1997).

Finally, evidence suggests that trial judges perversely have come to treat youth or disability as an *aggravating* factor in determining punishment. Thus, youths convicted of murder are more likely than adults convicted of murder to be sentenced to prison for life without the possibility of parole. See Barry C. Feld. *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 ND J.L. Ethics & Pub Pol'y 9, 52-53 (2008); Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California* 36 (2008), available at http://www.hrw.org/reports/2008/us0108/us0108web.pdf ("Respondents reported that in 56 percent of cases in which there was an adult codefendant, the adult received a lower sentence than the juvenile."). Individuals with disabilities also tend to receive more severe punishments for the offenses they commit. Judith Cockram, *Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability*, 30 J. Intell. & Dev. Disability 3, 9 (2005); Petersilia, *supra*, *Doing Justice?* at 23. That underscores the disproportionality of a life-without-parole sentence for a juvenile who might well be treated better if he were an adult.

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view that there was not a single colorable issue to be raised in the appeal of a 13-year-old child sentenced to die in prison. No. 08-7621, Pet. 6; *id.* Pet. Reply 6-7.

C. The Presence Of Disability Exacerbates The Unconstitutional Disproportionality Of Juvenile Life-Without-Parole Sentences.

Imprisoning any child for the rest of his or her life without any possibility of release violates the Eighth Amendment's proportionality standard. Because of their special needs and vulnerabilities, juveniles with disabilities serving life-without-parole terms face atypical and significant hardships on top of those suffered by juveniles generally.

First, the quality of mental health services provided to youth confined in correctional facilities is poor. Desai, *supra*, 34 J. Am. Acad. Psych. & Law at 208-209. Almost 20% of the nation's facilities do not have procedures in place for administration of psychotropic medication. Lindsay M. Hayes, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Suicide in Confinement: A National Survey* 4 (2009). Over 30% of facilities lacked onsite access to psychiatrists, psychologists, or master's degree-level social workers. *Ibid.* In Virginia, 8-10% of the youth in that system had serious mental health problems requiring immediate attention; of those, only 14% received any mental health services. Jennifer Wood et al., *An Examination of the Relationships Between Violence Exposure, Posttraumatic Stress Symptomatology, and Delinquent Activity: An "Ecopathological" Model of Delinquent Behavior Among Incarcerated Adolescents*, 6 J. Aggression, Maltreatment & Trauma 127, 129 (2002).[17]

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[17] Likewise, less than half of all juveniles who could have benefited from alcohol and drug counseling services actually received them. Paul E. Greenbaum, *Service Use Among Adoles-*

The disparity between the needs of incarcerated juveniles and the available services extends to educational and other programs. Many juveniles serving life-without-parole sentences lack access to services because prisoners who may someday be released are typically given priority.[18] These deficiencies may well violate States' affirmative obligation under the Individuals with Disabilities Education Act to provide all juveniles with disabilities with appropriate special education and support services, whether or not they are incarcerated. See 20 U.S.C. § 1412(a)(1)(A), (a)(11)(C); *Green* v. *Johnson*, 513 F. Supp. 965, 976 (D. Mass. 1981).

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cents With Comorbid Mental Health and Substance Use Disorders 7 (commissioned for the National Institute on Drug Abuse's May 2000 on Assessing the Impact of Childhood Interventions on Subsequent Drug Use), available at http://www.drugabuse.gov/meetings/childhood/Commissioned/Greenbaum/Greenbaum.pdf; see *supra* note 10.

[18] See, *e.g.*, Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* 21 (2008), available at http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf ("[Educational] programs often were, and are, expressly denied to those serving life without parole sentences. * * * The prison policy gives enrollment preference to those with less time to serve * * *."); Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California* 56-57 (2008), available at http://www.hrw.org/reports/2008/us0108/us0108web.pdf ("[P]rison practice and regulations give persons sentenced to life without parole the lowest priority for accessing programs."); Human Rights Watch, *Thrown Away* 32-33 (2005), available at http://www.hrw.org/reports/2005/us0205/us0205.pdf ("[C]hild offender[s] sentenced to life without parole * * * are not able to access the same variety of classes as individuals who will be released from prison at some point in the future.").

Moreover, even apart from the failure of the criminal justice system to meet the special needs of juveniles with disabilities, the more routine perils of confinement weigh especially heavily on them. Confinement itself aggravates the conditions of juveniles with disabilities. For example, "[i]ncarceration may precipitate major depression among vulnerable individuals." Eileen P. Ryan & Richard E. Redding, *A Review of Mood Disorders Among Juvenile Offenders*, 55 Psych. Servs. 1397, 1399 (2004). "[I]f all youth are to some degree at risk for suicide, juveniles in confinement may be at greater risk because they have life histories that predispose them to suicide," such as histories of mental health disorders and substance abuse. Hayes, *supra*, *Juvenile Suicide in Confinement: A National Survey* at 1-2.

* * *

As the Court recognized in a related context, the deficiencies of individuals who have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"—a description that aptly characterizes juvenile defendants generally, and juveniles with disabilities particularly—"do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Atkins*, 536 U.S. at 318. The diminished culpability of juveniles categorically precludes subjecting them to the punishment of life without parole. Even a very serious crime committed by a juvenile is far from reliable evidence of irretrievably depraved character—a circumstance of heightened constitutional significance in light of the

prevalence and documented effects of juvenile disability.

CONCLUSION

The judgments of the Florida District Court of Appeal should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari To The District Court Of Appeal, First District, State Of Florida

BRIEF OF *AMICI CURIAE* EDUCATORS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE WORK OF EDUCATORS DEMONSTRATES THAT BECAUSE JUVENILES ARE UNFORMED AND HAVE AN INHERENT CAPACITY FOR POSITIVE GROWTH AND REHABILITATION, LIFE WITHOUT PAROLE SENTENCES, WHICH WHOLLY DISREGARD THESE UNIQUE CHARACTERISTICS OF YOUTH, ARE EXCESSIVE, CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT 4

A. Education Theory And Practice Have Long Recognized The Dynamic, Transient Nature Of Youth 6

B. Educators Recognize That Children Are Particularly Susceptible To Negative Influences And Societal Harms, Including Poverty, Violence, Addiction, And Peer Pressure 11

C. The Success Of Educators Serving At-Risk Juveniles Demonstrates That All Juveniles Have A Unique Capacity For Transformation 14

TABLE OF CONTENTS – Continued

Page

D. Life Without Parole Sentences For Juveniles Are Contrary To Civilized Standards Of Decency 30

CONCLUSION 33

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 5, 10, 30

Grutter v. Bollinger, 539 U.S. 306 (2003) 32

Johnson v. Texas, 509 U.S. 350 (1993).....29

Kennedy v. Louisiana, 128 S.Ct. 2641 (2008) 5, 29, 30

Plyler v. Doe, 457 U.S. 202 (1982).....32

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

Stanford v. Kentucky, 492 U.S. 361 (1989).....14

Thompson v. Oklahoma, 487 U.S. 815 (1988).....6, 10, 30

Trop v. Dulles, 356 U.S. 86 (1958).....5

Wisconsin v. Yoder, 406 U.S. 205 (1972) 7

STATUTES

20 U.S.C. § 6421(b).....17

20 U.S.C. § 6472(2).....1

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Page

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Page

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Page

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Page

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Laurence Steinberg, & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychology 1531 (2007).....13

Tary Tobin, & Jeffrey Sprague, *Alternative Education Strategies: Reducing Violence in School and the Community*, 8 J. Emotional & Behav. Disorders 177 (2000).....20

TABLE OF AUTHORITIES – Continued

Page

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U.S. Charter Schools Website, New Non-Federal Research and Reports, http://www.uscharterschools.org/cs/r/query/q/1558?x-title=New+Non-Federal+Research+and+Reports 18

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Page

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STATEMENT OF *AMICI*[1]

Amici curiae are leading educators, scholars, and child advocates who believe that all children have the potential for growth and transformation so long as society does not give up on them.[2] Several *amici* are leaders of alternative education schools and programs who serve so-called "at-risk"[3] youth – adolescents who have been incarcerated, exhibited disruptive or violent behavior, dropped out of school, or who disproportionately face the insidious obstacles of poverty, neglect, violence, addiction, and other often incapacitating social harms. As educators, *amici* are intimately familiar with the dynamic, transient nature of youth and therefore categorically reject the notion that children are incorrigible and thus cannot be changed. On the contrary, educators know first-hand

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[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent from the parties have been filed with the Clerk's office.

[2] A full statement of each *amicus*'s interest can be found in the Appendix.

[3] The term "at-risk" encompasses a wide range of vulnerability factors. The No Child Left Behind Act of 2001, for example, defines an "at-risk" youth to include "a school aged individual who is at-risk of academic failure, has a drug or alcohol problem, is pregnant or is a parent, has come into contact with the juvenile justice system in the past, is at least 1 year behind the expected grade level for the age of the individual, has limited English proficiency, is a gang member, has dropped out of school in the past, or has a high absenteeism rate at school." 20 U.S.C. § 6472(2).

that because adolescents are still developing cognitively, socially, emotionally, and even physically, they possess an inherent capacity for positive growth and development. That defining characteristic of youth means that even the most at-risk or troubled child has the potential to transform his life as he matures. In light of these fundamental principles, which motivate *amici* to nourish each child's potential for positive development, *amici* write here to express their deep concern about the sentences at issue in these cases.

In particular, *amici* firmly believe that sentencing juveniles to life without parole ("LWOP") for non-homicide crimes committed during their youth wrongly ignores children's inherent potential to mature and rehabilitate, and cruelly deprives adolescents of any opportunity to utilize those qualities to one day become contributing members of society. Such sentences run counter to prevailing views about adolescent development, which are reflected in educators' professional consensus regarding the most successful education practices in the United States. Accordingly, *amici* respectfully submit that treating the failings of a minor like those of an adult is egregiously misguided and that ignoring adolescents' capacity for transformation by condemning juveniles to die in prison constitutes excessive, cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF ARGUMENT

In light of the categorical differences between adolescents and adults, which are fundamental to the mission and best practices of educators, it offends civilized standards of decency to sentence adolescents to die in prison for non-homicide offenses committed during their youth. To do so would fail to appreciate the lesser moral culpability of juvenile offenders and their diminished ability, as compared to adults, to understand the consequences of their conduct and to control their immediate surroundings in order to escape negative influences. *Amici* therefore agree with Petitioners that, in light of these fundamental differences between adults and adolescents, there is no justification for imposing LWOP sentences on juveniles as a means of deterrence or retribution for non-homicide offenses.

Even more fundamentally, educators like *amici* agree that sentencing children to die in prison for non-homicide offenses senselessly ignores children's capacity for growth and rehabilitation so early in their lives, wrongly treating those adolescents as irretrievably depraved. As the work of educators vividly demonstrates, however, juveniles are particularly amenable to the positive influences of education, community support, and rehabilitation because they are still developing. Alternative schools and programs, in particular – many of them led by *amici* – are committed to the principle that all children, regardless of the odds, have the potential to succeed. The remarkable success of these programs

demonstrates that even the most troubled or at-risk child can prevail over adversity, reform harmful behavior, and grow into a contributing member of society. Educators therefore reject as fundamentally erroneous the central premise upon which LWOP sentences for juveniles are founded – that some children are so irretrievably bad that they are incorrigible and cannot change. Because juvenile LWOP sentences for non-homicidal crimes deny those children's potential for growth and development, such sentences are out of step with norms of civilized society, and in violation of the prohibition on excessive, cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

THE WORK OF EDUCATORS DEMONSTRATES THAT BECAUSE JUVENILES ARE UNFORMED AND HAVE AN INHERENT CAPACITY FOR POSITIVE GROWTH AND REHABILITATION, LIFE WITHOUT PAROLE SENTENCES, WHICH WHOLLY DISREGARD THESE UNIQUE CHARACTERISTICS OF YOUTH, ARE EXCESSIVE, CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT.

The Eighth Amendment, which prohibits cruel and unusual punishments and applies to the States through the Fourteenth Amendment, "guarantees individuals the right not to be subjected to excessive

sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). That right is grounded in the fundamental principle that punishment should be proportional to the offense and that the government has a duty "to respect the dignity of all persons." *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). Consistent with those precepts, in evaluating whether a particular sentence violates the Eighth Amendment, this Court considers whether punishments are so disproportionate and contrary to "'evolving standards of decency that mark the progress of a maturing society'" as to be excessive or cruel and unusual. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)); *Atkins*, 536 U.S. at 311 n.7 (noting that the Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive"). Thus, to be proportionate and constitutional, punishment must be appropriately "justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2649 (2008).

This Court in *Roper* identified "three general differences" between adolescents and adults which can render certain sentences, when applied to juveniles, unjustified by those penological interests and therefore excessive, cruel or unusual. 543 U.S. at 569-70. First, because adolescents lack maturity and are still developing, they have an underdeveloped sense of responsibility. *Id.* at 569. Second, juveniles, as compared to adults, are both more vulnerable to

negative influences and societal pressures, including peer pressure, and less able to control their own environment in order to escape them. *Id.* Third, because adolescents are still developing, their characters and identities are not fully-formed. *Id.* at 570. These differences – which educators of at-risk students confront on a daily basis – indicate that juveniles are less culpable than adults for their mistakes or harmful behavior and that it is only "the rare juvenile offender whose crime reflects irreparable corruption" with absolutely no potential for rehabilitation. *Id.* at 573.

Here, in light of these categorical differences between adolescents and adults, with which educators are intimately familiar, "it would offend civilized standards of decency," *id.* at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion)), to sentence adolescents to die in prison for non-homicide offenses committed during their youth. Because doing so ignores juveniles' inherent capacity for positive growth and transformation, *amici* respectfully submit that such sentences are inconsistent with society's prevailing view of adolescents as reflected in the scholarship and accepted practices undergirding the work of leading educators.

A. Education Theory And Practice Have Long Recognized The Dynamic, Transient Nature Of Youth.

The very purpose of education – to help children develop into fully formed and self-sufficient persons –

speaks to the dynamic, unformed nature of youth. *See* Lawrence Kohlberg & Rochelle Mayer, *Development as the Aim of Education*, 42 Harv. Educ. Rev. 449, 493 (1972) (describing goal of education as "development, both intellectual and moral"); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."). Indeed, education theorists and scholars have long recognized that the best education practices are attuned to adolescents' unformed character and minds. Thus, the earliest proponents of so-called "progressive" education argued that traditional education models inappropriately "impose[d] adult standards, subject-matter, and methods upon those who are only growing slowly toward maturity." John Dewey, *Experience and Education* 18-19 (1938). Leading education theorist John Dewey observed that "the gulf between the mature or adult" world and that of the young required educational approaches responsive to the experiences and developmental needs of youth. *Id.* at 21-22, 50 ("Education as growth or maturity should be an ever-present process."); *see also* Jerome Bruner, *The Process of Education* 9 (1960) ("[S]chools must also contribute to the social and emotional development of the child if they are to fulfill their function of education for life in a democratic community and for fruitful family life"). Nurturing adolescents for positive development and growth has remained an essential component of education and a vital objective of educators.

Today, there exists a "national consensus on the need for 21st century schools to offer more than academic instruction to foster success in school and life for all children." Mark T. Greenberg et al., *Enhancing School-Based Prevention and Youth Development Through Coordinated Social, Emotional, and Academic Learning*, 58 Am. Psychologist 466, 474 (2003) ("[M]ost educators, parents, students, and the public support a broader educational agenda that also involves enhancing students' social-emotional competence, character, health, and civic engagement."). Many school-based prevention and youth development programs therefore aim to holistically foster adolescents' social, moral, and intellectual growth. *Id.* at 468-70. Schools serving at-risk students, in particular, often emphasize the development of morals and responsibility in their pupils. *See infra* Part C.

These programs, which recognize the positive impact of education on the unformed character and minds of youth, are supported by a wealth of evidence-based research showing that the brain continues to develop throughout childhood and in particular during the teenage years. *See* B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Biological Psychiatry 241, 253 (2000); *see also* Usha Goswami, *Neuroscience and Education*, 74 Brit. J. Educ. Psychol. 1, 3 (2004) (noting that "[b]rain volume quadruples between birth and adulthood"). A better understanding of development in the adolescent brain has shed light on and disproved

certain assumptions regarding how adolescents think, learn, and behave. *See generally* Goswami, *supra*. For example, "the frontal and parietal cortices" of the brain – the areas "associated with complex abilities such as planning, paying attention, and interacting with other people" – develop significantly during the teenage years and into the twenties. *See* Catherine Sebastian, *The Second Decade: What Can We Do About The Adolescent Brain?* 1 Opticon1826 1, 2 (2007), *available at* http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLIFE_Teenagers.pdf (noting that the "most profound differences between adults and adolescents occur at the decisionmaking or executive levels of processing"); *see also* Deanna Kuhn, *Do Cognitive Changes Accompany Development in the Adolescent Brain?* 1 Persp. Psychol. Sci. 59, 60 (2006). These changes are of interest to educators because they determine key competencies related to learning, such as the ability to exercise self-control and reason, and to "anticipat[e] the outcome of events." Sebastian, *supra*, at 2. All of this evidence indicates significant differences between adults and adolescents in brain functioning and behavior and confirms what has largely been implicit in education theory: that "teenagers are not the same as adults," but rather are works-in-progress who do not function with the same competencies, maturity, or cognitive abilities as adults. *See* Daniel R. Weinberger et al., *The Adolescent Brain: A Work in Progress* 19 (The National Campaign to Prevent Teen Pregnancy), 2005, *available at* http://www.thenationalcampaign.org/resources/pdf/BRAIN.pdf.

The significant differences between adults and adolescents – which educators confront every day – including the ability to exercise self-control, to reason, and to anticipate the outcome of events, *see* Sebastian, *supra*, at 2, indicate that adolescents are often unable to engage in the kind of foresight or "cost-benefit analysis that attaches any weight to the possibility of" a death-in-prison sentence. *See Thompson*, 487 U.S. at 837 (suggesting that offenders under 16 years old do not consider the consequence of death sentences for homicides). Because of that underdeveloped ability to engage in complex thought or anticipate the outcome of events, there is no legitimate justification for imposing LWOP sentences on juveniles as a means of deterrence. *See id.* at 836-38.

In addition, because the intellectual, social, and emotional maturity, and "character of a juvenile [are] not as well formed as that of an adult," irresponsible or harmful behavior by a juvenile "'is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835). This lesser culpability of juvenile offenders also renders LWOP sentences unjustified on grounds of retribution. *See Atkins*, 536 U.S. at 319 ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender."). Accordingly, LWOP sentences for juveniles are unjustified by sufficient penological interests and are therefore excessive, cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution.

B. Educators Recognize That Children Are Particularly Susceptible To Negative Influences And Societal Harms, Including Poverty, Violence, Addiction, And Peer Pressure.

As educators, *amici* also recognize that because children are still developing, they are especially vulnerable to negative influences and societal harms, including poverty, violence, addiction, and peer pressure. Indeed, the education theorist John Dewey recognized in 1938 that educational experiences do "not occur in a vacuum" but that children's ability to learn and positively develop is dramatically affected by the social environments in which they live and learn. *See* Dewey, *supra*, at 39-40. That principle has been confirmed by subsequent research showing that the more risk factors present in childhood environments – including whether children grow up in dangerous, polluted, and deteriorating neighborhoods, attend neglected and poorly functioning schools, or are exposed to violence and neglect in the home – the greater the threat to healthy adolescent development and cognitive growth. *See* Gary W. Evans, *The Environment of Childhood Poverty*, 59 Am. Psychologist 88 (2004); Brian J. Bigelow, *There's an Elephant in The Room: The Impact of Early Poverty and Neglect on Intelligence and Common Learning Disorders in Children, Adolescents, and Their Parents*, 34 Developmental Disabilities Bulletin 177, 185 (2006); *see also* Arnold J. Sameroff et al., *Stability of Intelligence from Preschool to Adolescence:*

The Influence of Social and Family Risk Factors, 64 Child Development 80, 80-97 (1993).

Poverty, in particular, is overwhelmingly "harmful to the physical, socioemotional, and cognitive well-being of children." Evans, *supra*, at 88; *see also* Bigelow, *supra*, at 202 ("The deleterious effects of stressful levels of poverty on early child development are no longer subject to serious debate."). Thus, the evidence suggests that poverty can impair brain growth and development starting from birth and "is often the most important variable in understanding children's learning disorders." Bigelow, *supra*, at 177-78.

Adolescents are also particularly vulnerable to drug abuse and addiction in light of the developing nature of their brains. Don Vereen, *Research Shows Consequences of Drug Abuse on the Teenage Brain*, The Challenge Vol. 14, No. 3 (U.S. Department of Education, Office of Safe and Drug-Free Schools), 2007, at 1, *available at* http://www.thechallenge.org/challenge_14_3.pdf. According to the U.S. Department of Education, juveniles are particularly susceptible to drug abuse because "[t]he critical areas in the brain used for making judgments and comprehending complex concepts like safety and freedom are not fully developed at age 15" and do not fully develop until the twenties. *Id.* Accordingly, experts contend that adolescents' heightened risk of addiction is often not simply a product of "social angst" or experimentation, but rather results from the fact that such "factors occur during a period of dramatic

changes" in the adolescent brain. *Interview with Nora Volkow, M.D., Director of the National Institute on Drug Abuse (NIDA)*, The Challenge, Vol. 14, No. 3 (U.S. Department of Education, Office of Safe and Drug-Free Schools), 2007, at 2.[4]

Research further indicates that adolescents are particularly susceptible to the negative influence of peers. *See* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychology 1531 (2007) ("[T]here is little doubt that peers actually influence each other and that the effects of peer influence are stronger during adolescence than in adulthood."); *see also* Evans, *supra*, at 78, 88 (noting children from low-income families who are exposed to unstable home environments and other risk factors, are "more likely to rely on peers than adults" and are particularly vulnerable to aggressive peers). And, significantly, "susceptibility to peer pressure" is greatest when anti-social behavior and delinquency are involved. Steinberg, *supra*, at 1532. Such susceptibility, and with it, the likelihood of anti-social behavior, however, abates with age and development.

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[4] Preliminary research also suggests that the brain's neurological response to drugs such as nicotine and marijuana is different in adolescence than in adulthood. *See* Nora Volkow & Ting-Kai Li, *The Neuroscience of Addiction*, 8 Nature Neurosci. 1429 (2005). Scientists are beginning to explore how this neurological difference contributes to adolescents' predisposition to addiction. *Id.*

In working to advance the social and emotional development of adolescents, educators necessarily confront these vulnerabilities on a daily basis. Their experience reflects what this Court recognized in *Roper*: that "juveniles are more vulnerable or susceptible to negative influences and outside pressure, including peer pressure" because of their "lack of maturity" and underdeveloped character and identity. 543 U.S. at 569. While "[t]hese qualities often result in impetuous and ill-considered actions and decisions," *id.* (internal citation and quotations omitted), as this Court has recognized, juveniles' "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570 (citing *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)). This difference between adolescents and adults further renders LWOP sentences for juveniles unjustified on grounds of deterrence or retribution. Accordingly, such sentences are excessive, cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution.

C. The Success Of Educators Serving At-Risk Juveniles Demonstrates That All Juveniles Have A Unique Capacity For Transformation.

Most fundamentally, the experience of educators in successfully teaching at-risk adolescents who have been so often dismissed as "too difficult" or "not worth

it" undermines the primary basis for LWOP sentences for juveniles – the notion that some children are so irretrievably depraved that they are incapable of reform. As the work of *amici* and other educators demonstrate, all adolescents have the potential for positive growth and development, and even the most troubled youth can change and be rehabilitated.

The Department of Education recently decried that "[o]ne of the more insidious myths about education is that students who have traditionally been characterized as 'at risk' cannot manage a rigorous college preparatory curriculum and that if pushed too hard they will drop out of school." U.S. Department of Education, Office of Innovation and Improvement, *Charter High Schools: Closing the Achievement Gap* 30-31 (2006), *available at* http://www.ed.gov/admins/comm/choice/charterhs/report.pdf. The achievements of at-risk youth in alternative schools and other programs debunk that misconception, demonstrating that when adolescents' developmental needs are properly addressed, these children can succeed. *Id.* at 22, 31. These positive results speak to the potential of all juveniles – even the most at-risk or troubled child – to positively develop and transform their lives as they mature to become contributing members of society.

Indeed, a critical component of successfully reaching at-risk students is educators' refusal to treat them as "lost causes" who are incapable of change. In fact, the available evidence suggests that when schools and communities reject troubled or at-risk

children, adolescents are even more likely to experience repeated failure. *See* Cheryl M. Lange & Sandra J. Sletten, *Alternative Education: A Brief History and Research Synthesis*, Project FORUM (National Association of State Directors of Special Education), 2002, at 12, *available at* http://www.projectforum.org/docs/alternative_ed_history.pdf (finding that studies of school dropouts indicate that "school climate of rejection by teachers or peers has a strongly negative effect on the prospect for students at risk"); Sarah Ingersoll & Donni LeBoeuf, *Reaching Out to Youth Out of the Education Mainstream*, Juvenile Justice Bull. (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention), Feb. 1997, at 6, *available at* http://www.ncjrs.gov/pdffiles/163928.pdf (noting that challenges to reintegration of students from the juvenile justice system are due to the fact that "these youth frequently face parents who have given up on them, teachers and fellow students who fear them, and citizens who do not want them in the community"); *see also* National Research Council, Commission on Behavioral and Social Sciences and Education, *Losing Generations: Adolescents in High-Risk Settings* 102-03, 117 (1993); Mark Dynarski & Philip Gleason, *How Can We Help? What We Have Learned from Evaluations of Federal Dropout-Prevention Programs* 5 (1998) (submitted to U.S. Department of Education by Mathematica Policy Research, Inc.), *available at* http://www.mathematica-mpr.com/publications/PDFs/dod-syn.pdf; Laudan Y. Aron, *An Overview of Alternative Education* (The Urban Institute), Jan. 2006, at 15, *available at*

http://www.urban.org/UploadedPDF/411283_alternative_education.pdf. To be sure, at-risk students may exhibit defiant and disruptive behavior, making the task of education even more challenging. *See* James Forman, Jr., *Out of Jail and Into Jobs*, 8 Educ. Next 44, 48 (Fall 2008) *available at* http://media.hoover.org/documents/ednext_20084_44Forman.pdf. During the past few decades, however, innovative educators have taken stock of these entrenched obstacles, and sought to alter existing institutional structures and challenge preconceived notions about at-risk students, including those with behavioral problems. By addressing the needs of especially defiant, disruptive, at-risk students, these educators have enabled thousands of students to reform their behavior, overcome their challenges, and achieve success.

In particular, over the past half-century, educators and policymakers have increasingly embraced evolving education models for helping students at risk of failure in school. Lange & Sletten, *supra*, at 1; *see also* No Child Left Behind Act of 2001, § 1401(b), 20 U.S.C. § 6421(b) (providing funding for state and local educational agencies to "establish or improve programs of education for neglected, delinquent, or at-risk children or youth"). Innovative schools and programs have had dramatic success in maximizing at-risk students' potential, including by improving test scores, increasing college placements and achieving greater stability and transition to work. *See generally Charter High Schools*, *supra*; Social Policy Research Associates, *Evaluation of the YouthBuild*

Youth Offender Grants (Final Report May 2009) (Prepared for Department of Labor/ETA), *available at* http://wdr.doleta.gov/research/FullText_Documents/Evaluation%20of%20the%20YouthBuild%20Youth%20Offender%20Grants%20%2D%20Final%20Report%2E pdf; U.S. Charter Schools Website, New Non-Federal Research and Reports, http://www.uscharterschools.org/cs/r/query/q/1558?x-title=New+Non-Federal+Research+and+Reports; David Whitman, *Sweating the Small Stuff: Inner-City Schools and the New Paternalism* (Thomas B. Fordham Institute), 2008, *available at* http://www.edexcellence.net/doc/20080826-sweating-the-small-stuff.pdf.

In addition to improving students' scores and easing transition for troubled youth into the workforce, programs aimed directly at preventing crime by juveniles exposed to violence have been found to "cost-effectively intervene in young and troubled lives to prevent harmful and costly behaviors." Little Hoover Commission, *Never Too Early, Never Too Late: To Prevent Youth Crime and Violence* ii (June 2001), *available at* http://www.lhc.ca.gov/studies/159/report159.pdf. Additionally, studies of prison education programs have found that inmates who participate in those programs are more likely to be employed and less likely to re-offend than nonparticipants – if and when they are released. Ronald D. Stephens & June Lane Arnette, *From the Courthouse to the Schoolhouse: Making Successful Transitions* (U.S. Department of Justice, Office of Juvenile Justice and

Delinquency Prevention), Feb. 2000, at 4, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178900.pdf.

Studies of these efforts prove "that all students – even those who are often labeled as slow, lazy, or troubled in traditional schools – can be productive and successful in creative educational settings that provide a personalized approach." J.D. Hoye & Chris Sturgis, *The Alternative Pathways Project: A Framework for Dropout Reduction and Recovery* 5 (June 2005), *available at* http://www.ytfg.org/documents/AltPathv.7.7Julyfin_000.pdf; *see also* Whitman, *supra*, at 252. Many of the most effective and successful alternative schools include within their curriculum practices and methods that specifically address the developmental changes experienced by at-risk students during adolescence as well as their vulnerability to negative influences and societal harms. *See Charter High Schools*, *supra*, at 22 (observing that successful charter secondary schools have specialized programs to address "any adolescent life issue that arises, whether academic, personal, or social"); *see also* Jodie L. Roth & Jeanne Brooks-Gunn, *Academic Success, Adolescence*, in *Encyclopedia of Primary Prevention and Health Promotion* 140, 143 (Thomas P. Gullotta & Martin Bloom eds., 2003) (citations omitted) ("Adults who support adolescents' learning with high expectations, an understanding of the cognitive, social, and emotional changes that occur during adolescence, and a solid grasp of the subject

matter, create a secure and positive learning environment that encourages and promotes adolescents' academic success."). Other identified best practices are also tailored to address the vulnerabilities of at-risk adolescents and to maximize the potential for positive growth and development. *See* Tary Tobin & Jeffrey Sprague, *Alternative Education Strategies: Reducing Violence in School and the Community*, 8 J. Emotional & Behav. Disorders 177, 177-86 (2000) (finding alternative education practices that promote success among at-risk youth include small class size to enable individualized instruction, "clearly defined rules and consequences," positive reinforcement, a focus on social skills, mentoring and parental involvement); Dynarski & Gleason, *supra*, at 4; *see also Charter High Schools*, *supra*, at 7-32 (reviewing "common themes" of high achieving schools); Hoye & Sturgis, *supra*, at 7-9 (same); Aron, *supra*, at 11-13 (same); Betsy Brown Ruzzi & Jacqueline Kraemer, *Academic Programs in Alternative Education: An Overview* (National Center on Education and the Economy), April 2006, at 31, *available at* http://www.doleta.gov/youth_services/pdf/ae_overview_text.pdf (same); Forman, Jr., *supra*, at 47-48; (same); Lange & Sletten, *supra*, at 10-12 (same).

Recognizing the particular vulnerability of adolescent at-risk students, many alternative schools have sought to emphasize inviting school climates that foster individual relationships between teachers

and students by providing small schools and classes and counseling services. The animating theory of many of these schools is "that a sense of caring will encourage students to persist in their school experience and, together with a sense of academic success, will increase self-esteem." Lange & Sletten, *supra*, at 12; *see also* Geoffrey Canada, *fist stick knife gun: A Personal History of Violence in America* 109 (1995) (explaining need for schools and programs to provide to at-risk children "sense of protection and security"); Dynarski & Gleason, *supra*, at 4-5 (describing counseling as primary tool to overcome obstacles to progress and success in schools used by dropout-prevention program); *Charter High Schools*, *supra*, at 19-24 (identifying "wraparound student support" – including low student-to-teacher ratio, counselors, social workers, family and community involvement – as a common theme of charter secondary schools that have successfully closed the achievement gap); Ruzzi & Kraemer, *supra*, at 31 (highlighting importance of "personal relationships between the students and the teachers and individualized attention to each student's learning needs, strengths, and life situations"); Aron, *supra*, at 12 (same).

For example, the See Forever Foundation and the Maya Angelou Public Charter School, based in Washington, D.C., which serve "kids who were in school, who had been suspended or expelled, who had been locked up" achieve impressive academic

outcomes, with one of its schools ranked in the top quarter of similar schools for academic improvement. Forman, Jr., *supra*, at 49. The co-founder of the school, *amicus* James Forman, Jr., attributes the students' achievement not only to a relevant and interesting curriculum, but also to "high expectations," and to the "caring, trusting, and loving relationships" that are fostered in the educational setting. *Id.* at 47-48. The teaching methods and environments of institutions like these are specifically designed to address adolescents' particular stage of development and their attendant developmental needs. *See* Roth & Brooks-Gunn, *supra*, at 143.

Similarly, effective educational models for detained and incarcerated youth emphasize individual and family counseling, treatment, and development of conflict resolution skills. Ingersoll & LeBoeuf, *supra*, at 7. For example, in a study of more than twenty dropout-prevention programs throughout the country, researchers found that alternative middle school programs, which provided intensive counseling services and individualized attention through small classroom settings to students with low ability or who had felt alienated and failed in regular schools, succeeded in keeping kids in school and advanced their academic progress. Dynarski & Gleason, *supra*, at 12-20. Specifically, students in the programs "were half as likely to drop out" and advanced further in school than they did when educated under traditional models. *Id.* at 18-20.

In addition, because adolescents' moral consciousness is still developing, and in order to counteract their particular susceptibility to negative influences and societal harms, innovative schools seek to influence students' behavior by incorporating values and character education into the curriculum. Paul Tough, *What It Takes to Make a Student*, The New York Times Magazine, Nov. 26, 2006. Educators in these institutions have stressed the development of "social and emotional competencies" in teaching at-risk students. Forman, Jr., *supra*, at 50; *see also* U.S. Department of Education, Office of Educational Research and Improvement, *Education Reform and Students at Risk: Studies of Education Reform* 37 (1997) (finding that successful charter schools serving at-risk populations "provide students with emotional stability and intellectual engagement" and create "educational communities of resilience") (internal quotation marks and citations omitted); Peter E. Leone et al., *School Failure, Race, and Disability: Promoting Positive Outcomes, Decreasing Vulnerability for Involvement with the Juvenile Delinquency System* (The National Center on Education, Disability, and Juvenile Justice), Oct. 2003, at 12-13, *available at* http://www.edjj.org/Publications/list/leone_et_al-2003.pdf (finding that focus on cognitive, emotional and moral development aids at-risk youth in making "appropriate behavioral choices in the presence of multiple risk factors"). Also, studies of successful individual classrooms have noted that a focus on students' moral development and the encouragement of ethical deliberation are integral to

academic achievement. *See, e.g.*, Mike Rose, *Possible Lives: The Promise of Public Education in America* 432 (1995). These educational practices are predicated on an accepted truth that LWOP sentences ignore: adolescents are still developing and ought not be viewed as lost causes, incapable of educational, social, or moral progress.

For example, high-achieving charter schools – such as those operated as part of the Knowledge is Power Program (KIPP) and Achievement First – have built upon psychological research, and stressed the importance of self-discipline as a means to high academic achievement. Tough, *supra* (describing innovative and successful educators' reliance on research stressing importance of "'noncognitive' abilities like self-control, adaptability patience and openness" to achieving academic success); Angela L. Duckworth & Martin E.P. Seligman, *Self-Discipline Outdoes IQ in Predicting Academic Performance of Adolescents*, 16 Psychological Sci. 939, 944 (2005) ("We believe that many of America's children have trouble making choices that require them to sacrifice short-term pleasure for long-term gain, and that programs that build self-discipline may be the royal road to building academic achievement."); David Whitman, *supra*, at 20, 38, 260-62 (noting that emphasis on behavior and order was most important factor to success of at-risk students in innovative secondary schools). Similarly, critical to the success of the SEED Public Charter

School of Washington, D.C., a school aimed at underserved students from low socioeconomic backgrounds – beyond its intensive academic program – is its emphasis on "Habits For Achieving Life Long Success," which include life skills, conflict resolution, time management, making good choices and a "focus on five core values: respect, responsibility, self-discipline, compassion, and integrity." *Charter High Schools*, *supra*, at 56. The Maya Angelou Public Charter School likewise focuses on fostering resiliency in its students, stressing self-control, delaying gratification, goal-setting, and acceptance of responsibility. Forman, Jr., *supra*, at 50. The schools' emphasis on behavior modification and character development and their resulting success are a testament to educators' understanding of the dynamic nature of adolescence and the capacity of even troubled youth to reform and flourish as they grow towards adulthood.

Fundamentally, educators of at-risk students all unequivocally reject the notion that children cannot be changed or are incorrigible and therefore cannot be educated. *See* Ingersoll & LeBoeuf, *supra*, at 9 (finding that effective programs for at-risk youth may "prevent crime and delinquency and nurture each child's potential to become a successful and contributing member of society" and that "[e]ach young person deserves the opportunity to demonstrate that he or she is capable of success"); Nancy Martin & Samuel Halperin, *Whatever It Takes: How Twelve Communities Are Reconnecting Out-of-School Youth*

(American Youth Policy Forum), 2006, at 2-3, *available at* http://www.aypf.org/publications/WhateverItTakes/WITfull.pdf (finding that all successful dropout recovery programs viewed youth "as potentially motivated young adults and students of promise"). The students' remarkable rates of achievement at these schools and in these programs validate the view that all children have the capacity for positive growth and development, and that even troubled children can transform themselves as they mature.

The SEED school, for example, was founded on "the premise that all children can succeed in school, regardless of social or economic barriers, if given the right environment and support." *Charter High Schools*, *supra*, at 55. Consequently, SEED students outperform their peers in Washington, D.C. schools by an almost 2 to 1 margin. *Id.* at 58. In addition, 100 percent of the class of 2005 was accepted to four-year colleges. *Id.*

Similarly, The Door, an organization in New York City that provides a range of integrated services to over 11,000 youth each year, 20 percent of whom have been involved with the justice system, and 25 percent of whom have either been homeless or been placed in foster care, operates based upon "the philosophy that every young person has untapped potential." The Door, *The Door 2008 Annual Report* 1, 3 (2003), *available at* http://www.door.org/pdf/Door%20Annual%20Report_FINAL%20FOR%20WEB.pdf. Through the Door's support system and nurturing of that potential, 600

youth applied for post-secondary education in 2008, and 70 percent of those applicants are expected to begin school in the fall of 2009. *Id.* at 5.

Educators concur that immensely critical to the success of at-risk students, particularly those who have failed in traditional schools or been incarcerated, is instilling in them the understanding that "the adults in the room won't give up on them, won't just teach the kids who are getting it, and won't write them off as incorrigible." Forman, Jr., *supra*, at 48. Indeed, at-risk students interviewed in studies of secondary charter schools that have achieved notable success in academic outcomes and college placement have all identified educators' trust and confidence in their capacity to change and succeed as instrumental to their own achievement. *See Charter High Schools, supra*, at 11 ("'They push and they push hard. Knowing that they care is my safety net. Teachers believed in me so I started to work hard and then harder.'" (quoting student from YES College Preparatory School, Southeast Campus, Houston, Texas)); *id.* at 38 ("'I had teachers tell me I was stupid, dumb, wouldn't amount to anything. Here it is okay to have learning differences. I'm comfortable being me because they don't let you fall, but if you do they pick you up.'" (quoting student from Gateway High School, San Francisco)); *id.* at 46 ("'[H]ere I can change myself.'" (quoting student from Minnesota New Country School, Henderson, Minnesota)); *id.* at 50 ("'Here the teachers don't give up on you. They are working for your future, to help you go to college.'" (quoting student from North Star Academy Charter

School of Newark)); *id.* at 62 ("'I think this school is amazing because over the years it kept me out of trouble. I would be in jail or dead right now, because a lot of my friends are in jail or dead.'" (quoting student from Toledo School for the Arts)).

The work of educators demonstrates that as juveniles grow and mature, they are amenable to positive influences such as education, community support, and rehabilitation precisely because they are still developing. This illustrates that as compared to adults, juveniles have a greater capability to reform their behavior in order to become productive, healthy citizens. Indeed, the successful programs of several *amici* show that even the most troubled or at-risk child can prevail over disadvantage, hardships, and even serious adolescent mistakes and transform his life as he matures so long as society does not give up on him. Increased test scores, the closing of the achievement gap, and the high rate of college acceptances at many of the alternative schools serving at-risk youth, *see, e.g.*, *id.* at 35-66, as well as the reduction in recidivism rates associated with prison education programs, *see* Stephens & Arnette, *supra*, at 4, all demonstrate that adolescents can overcome some of the most difficult obstacles when their cognitive, social, and emotional capacities are nurtured and their potential for positive growth is not denied.

As this Court observed in *Roper*, children's ongoing development and susceptibility to outside pressures render it "less supportable to conclude that even a heinous crime committed by a juvenile is

evidence of irretrievably depraved character." 543 U.S. at 570 (citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993) (noting that youth is a mitigating factor because "'signature qualities of youth are transient'" and that "'impetuousness and recklessness'" diminish with maturity)); *see also* Juvenile Detention Alternatives Initiative, *Detention Reform: An Effective Public Safety Strategy* 4 (2007), *available at* http://www.aecf.org/upload/PublicationFiles/jdai_facts2.pdf (citing research showing "that three-fourths of all youth who commit serious violent crimes during adolescence terminate their offending by age 21"). In fact, the positive results from *amici* and other educators demonstrate that even the most troubled youth, are capable of rehabilitation – a penological interest bearing on the appropriateness of particular sentences. *See Kennedy*, 128 S.Ct. at 2649. Therefore, as this Court recognized, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570. Accordingly, in light of adolescents' inherent potential for transformation, which distinguishes juveniles from adults, LWOP sentences for juveniles who have committed non-homicide offenses are excessive, cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution.

D. Life Without Parole Sentences For Juveniles Are Contrary To Civilized Standards Of Decency.

The experience of educators in successfully teaching at-risk adolescents who have been so often dismissed as "too difficult" or "not worth it" demonstrates that depriving adolescents of the opportunity to utilize their inherent potential for positive growth and development by sentencing them to die in prison for mistakes made during their youth is contrary to civilized standards of decency. As this Court has recognized, "evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Kennedy*, 128 S.Ct. at 2649. For that reason, "measures of consensus" that reflect society's view regarding standards of human dignity have appropriately informed this Court's jurisprudence addressing the excessiveness or cruelty of particular punishments. *See id.* at 2657 (finding "social consensus against the death penalty for the crime of child rape" based on infrequency of executions); *Atkins*, 536 U.S. at 316 n.21 (citing views of leading mental health and religious experts as "additional evidence . . . [of a] much broader social and professional consensus" regarding the excessiveness of the death penalty for mentally retarded individuals); *Thompson*, 487 U.S. at 830 (citing views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European

community" in concluding that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense). Thus, here, in determining whether LWOP sentences for juveniles are out of step with the norms of civilized society, the views of educators who are intimately familiar with the competencies and potential of youth are especially pertinent, and the successful practices of *amici* and other educators should inform the decision of this Court that LWOP sentences for juveniles are excessive, cruel and unusual.

As set forth above, in light of the undisputable differences between adults and adolescents, which are integral to the mission and best practices of educators, there is no justification consistent with the norms of civilized society for imposing LWOP sentences on juveniles as a means of deterrence or retribution for non-homicide offenses. Even more fundamentally, as professionals committed to nourishing each child's potential for success, educators like *amici* resolutely believe that wholly depriving adolescents of the opportunity to utilize their inherent capacity for positive growth and development by sentencing them to die in prison for mistakes made during their youth is contrary to civilized standards of decency. In fact, to deny children's inherent potential for growth and transformation would be contrary to the long-standing work and objectives of educators, which this Court has recognized "as pivotal to" preparing adolescents for citizenship and "maintaining the fabric" of civilized

society. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). While educators cannot always predict which child who faces considerable odds in life will triumph over his disadvantaged circumstances or who will face ongoing adversity, they firmly believe that because adolescents are still developing cognitively, socially, and emotionally, society must give each adolescent a chance. Significantly, *amici* believe that realizing each child's potential is not simply a matter of resources: whether in prison educational programs, traditional public schools, or alternative schools, children are most likely to succeed when adults simply recognize their potential and refuse to give up on them because of failures during their youth.

In contrast to these prevailing views about adolescent growth and development, LWOP sentences for juveniles ignore children's capacity for growth and rehabilitation, so early in their lives, and treat them as irretrievably depraved. It is this aspect of a juvenile LWOP sentence in particular – the wholesale disregard of a child's inherent potential for transformation and the denial of any opportunity to utilize those qualities for positive growth – that categorically distinguishes it from other long-term, non-death prison sentences, and renders it contrary to civilized standards of decency. For these reasons, *amici* respectfully submit that such sentences are impermissibly excessive, cruel and unusual, and violate the

Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decisions of the District Court of Appeal, First District, State of Florida should be reversed.

Respectfully submitted,

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APPENDIX

Geoffrey Canada is President and Chief Executive Officer of Harlem Children's Zone (HCZ). The organization began in 1970 working with young children and their families as New York City's first truancy-prevention program. As the crack epidemic tore through Harlem in the 1980s and 1990s, many inside and outside Harlem gave up hope. Believing that new approaches were necessary to save children in this disintegrating community, HCZ turned a local public school into a thriving community center and worked to make Harlem's schools safer. Following the organizational creed to do "whatever it takes" when it comes to helping children succeed, Mr. Canada, in 1997, launched the Harlem Children's Zone Project, which targeted a 24-block area in Central Harlem with a comprehensive range of services, including pre-school programs, parenting workshops, and health initiatives. The Zone Project today covers 100 blocks and serves over 10,000 children. Over the years, HCZ introduced several ground-breaking efforts, including the Promise Academies, two high-quality public charter schools. The Promise Academy middle school, in particular, has achieved remarkable success, having eliminated the achievement gap between its black students and the city average for white students. Mr. Canada and HCZ have been the subject of hundreds of media stories and received scores of awards recognizing their contribution to the cause of children and education. Mr. Canada's and HCZ's work are also the subject of the book by Paul

Tough, *Whatever It Takes: Geoffrey Canada's Quest to Change Harlem and America* (2008). Noting the great success of HCZ, President Obama has said he will seek to "replicate the Harlem Children's Zone in twenty cities across the country."

David Domenici and James Forman, Jr. are co-founders of See Forever Foundation and Maya Angelou Public Charter Schools. Concerned that children leaving the District of Columbia's juvenile detention facility had few programs to get them on track, in 1997, Mr. Domenici and Mr. Forman left their jobs as young lawyers and founded See Forever Foundation and the Maya Angelou Public Charter School, which work to create learning communities in lower income urban areas where all students, particularly those who have not succeeded in traditional schools, can reach their potential. See Forever has spent the last 11 years building successful alternative educational programs for young people who have been court-involved, truant, or unsuccessful in traditional schools. The Maya schools have been very successful. This past year, 93 percent of its graduates were accepted into 4-year or 2-year colleges and universities. Research shows that they are outperforming their peers. Over 70 percent go on to college or postsecondary school (compared to less than 40 percent of students graduating from district public schools). **James Forman, Jr.** is also a Professor at Georgetown Law School, where he teaches and writes in the area of Criminal Procedure and Education Law and Policy. **David Domenici** is the principal of the

Maya Angelou Academy, the school located inside of New Beginnings, the District of Columbia's secure facility for youth who have been adjudicated delinquent. The Maya Angelou Academy is a part of See Forever's network of schools.

Fr. Jim Gartland, S.J., is the President of Cristo Rey Jesuit High School, a neighborhood school with the mission of offering the best college preparatory education available to the youth of the Pilsen/Little Village community of Chicago, for whom other private schools are not a financial option. Founded in 1996, Cristo Rey now educates more than 530 students each year with virtually all students accepted to at least one college. Today 82 percent of Cristo Rey graduates are currently attending or have completed college. Cristo Rey is increasingly receiving national recognition as a ground breaking model for urban education. In response to the success of Cristo Rey, the Cassin Educational Initiative Foundation and the Bill & Melinda Gates Foundation invested close to $30 million toward replicating this educational model around the United States. Currently, there are 24 schools throughout the country that are associated through the Cristo Rey Network and operate using the educational model named for the first Cristo Rey School in Chicago.

Khary Lazarre-White is the Executive Director and Co-Founder of The Brotherhood/Sister Sol Inc. (BHSS). Founded in 1995, BHSS provides comprehensive, holistic and long-term support services to youth in Harlem who range in age from six to

eighteen, focusing on leadership development, educational achievement, bias reduction, sexual responsibility, sexism and misogyny, political education and social justice, Pan African and Latino History, and global awareness. Among the many services BHSS provides to youth in the community are school and home counseling, job training, college preparation, employment opportunities, and activist training. BHSS publishes assorted curricula and collections of youth writings and trains educators throughout the nation. One of the founding tenets of BHSS is that every young person can be reached and can change the course of his or her life through proper guidance and support, opportunities and resources, and through education and learned discipline. The Brotherhood/Sister Sol has earned national recognition, receiving awards that include Oprah Winfrey's Angel Network Use Your Life Award, Ford Foundation's Leadership for a Changing World Award, and the Exemplary Advocacy Organization Award from the New York State Department of Education.

Dr. Peter E. Leone is a Professor of Special Education, at the University of Maryland, College of Education, and specializes in Behavior Disorders. His experience includes direct service to troubled youth as well as field-based research which examines the multidimensional problems associated with behavior disorders. Dr. Leone points to the role of environmental and cultural factors in the inception of behavior disorders and believes educators need to take a multidisciplinary approach when implementing

programs for troubled or troubling youth. Dr Leone's research interests focus on program environments for troubled youth, educational entitlements of incarcerated youth, and policy studies. He directs The National Center on Education, Disability, and Juvenile Justice, a research, training and technical assistance project funded by the U.S. Department of Education. Dr. Leone has had numerous articles published in professional journals and has made many presentations at national, state, and local conferences on topics related to the effective treatment and instruction of behaviorally disordered youth.

Dr. M. Ann Levett is the Executive Director of the School Development Program at the Yale University Child Study Center. The Yale Child Study Center is a department at Yale University School of Medicine that brings together multiple disciplines to further the understanding of the problems confronted by children and families. Among the many disciplines involved in the Child Study Center are child psychiatry, pediatrics, genetics, neurobiology, epidemiology, psychology, nursing, social work and social policy. The mission of the Center is to understand child development, social, behavioral, and emotional adjustment, and psychiatric disorders and to help children and families in need of care. Housed within the Child Study Center is the School Development Program (SDP), the organization charged with implementing in school communities, the Comer Process, a school and system-wide intervention formulated by Dr.

James P. Comer, Maurice Falk Professor of Child Psychiatry at the Yale University School of Medicine's Child Study Center. The SDP aims to bridge child psychiatry and education by focusing on the six developmental pathways along which children mature – physical, cognitive, psychological, language, social, and ethical.

Dianne Morales is the Executive Director of The Door. The Door is an organization in New York City that serves over 11,000 young people each year by empowering them to reach their potential by providing comprehensive youth development services in a diverse and caring environment. Founded in 1972 to address the acute crisis affecting America's urban adolescent population, The Door employs a holistic approach that helps each individual member to dismantle the complex barriers that often stand in the way of success. Among its many services, The Door provides primary health care, health education, mental health counseling, legal services, GED, ESL, tutoring and homework help, college preparation and computer classes, career development services and training, job placement, daily meals, arts, sports and recreational activities.

Dr. Pedro Noguera is a professor in the Steinhardt School of Culture, Education, and Human Development at New York University. He is also the Executive Director of the Metropolitan Center for Urban Education and the co-Director of the Institute for the study of Globalization and Education in Metropolitan Settings. An urban sociologist, Dr.

Noguera's scholarship and research focus on the ways in which schools are influenced by social and economic conditions in the urban environment. Dr. Noguera has served as an advisor to and engaged in collaborative research with numerous large urban school districts throughout the United States.

Sharon Olken is the Principal of the Gateway High School in San Francisco, a model college preparatory charter school committed to academic excellence through personalized, student-centered learning. At the core of the Gateway philosophy is an individualized approach to teaching and learning that fosters an environment for each student to reach his or her potential. The Gateway curricular program aims to prepare students for academic excellence in college and for lives which demonstrate integrity, responsibility, intellectual curiosity, and respect for a culturally diverse world. Gateway is particularly committed to providing high quality college preparation for students with diagnosed disabilities and to ensuring that its diverse student body includes at-risk students facing the insidious obstacle of childhood poverty. Due to Gateway's rigorous curriculum, personalized, student-centered learning, and intensive social and emotional support, 95 percent of its graduates attend college compared with a district-wide 77 percent. In 2009, *Newsweek* named Gateway one of its "top U.S. High Schools."

Christine Pahigian is the Executive Director of Friends of Island Academy (FOIA). FOIA is a community-focused organization that works with

youth, primarily ages 15 to 19 coming home from jail and/or detention in New York City. The organization seeks to re-integrate these youth and prevent them from re-entering the system. FOIA reaches out to youth prior to their release from Rikers Island and upon discharge, provides them with job training, counseling, education, mentoring, and youth leadership development to help participants stay out of trouble, take responsibility for themselves, and work to rebuild their lives. Founded in 1990, FOIA evolved from the conviction that with intense support and access to opportunity, many young people could be saved from a life of recurrent criminal behavior.

AMICUS CURIAE BRIEF

Nos. 08-7412 and 08-7621

Supreme Court, U.S.
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JUL 23 2009
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IN THE
Supreme Court of the United States

TERRANCE JAMAR GRAHAM
Petitioner,

v.

FLORIDA
Respondent.

JOE HARRIS SULLIVAN
Petitioner,

v.

FLORIDA
Respondent.

On Writs of Certiorari from the District Court of Appeal of Florida, First District

BRIEF OF FORMER JUVENILE OFFENDERS CHARLES S. DUTTON, FORMER SEN. ALAN K. SIMPSON, R. DWAYNE BETTS, LUIS RODRIGUEZ, TERRY K. RAY, T.J. PARSELL, AND ISHMAEL BEAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THIS COURT HAS RECOGNIZED THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT 4

II. THE LIFE STORIES OF THE *AMICI* SHOW THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT AND THAT INCARCERATING A YOUTHFUL OFFENDER FOR LIFE WITHOUT PAROLE CAN BE A TREMENDOUS LOSS TO SOCIETY 7

A. Charles S. Dutton 7

B. Senator Alan K. Simpson 11

C. R. Dwayne Betts 15

D. Luis Rodriguez 19

E. Terry K. Ray 21

F. T.J. Parsell 23

G. Ishmael Beah 27

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008) 5

Roper v. Simmons, 543 U.S. 551 (2005) 3, 4, 5, 6

Thompson v. Oklahoma, 487 U.S. 815 (1988) 5

Trop v. Dulles, 356 U.S. 86 (1958) 32

STATUTES

18 U.S.C. § 844(f)(1) 12

18 U.S.C. § 844(f)(3) 12

Mich. Comp. Laws § 750.356 24

Mich. Comp. Laws § 750.529 24

OTHER AUTHORITIES

Ishmael Beah, *A Long Way Gone* (2007) 8

Ernest Hooper, *After Jail, Arts Pave Way Back Into Life*, St. Petersburg Times, Sept. 14, 2007, *available at* http://www.sptimes.com/2007/09/14/Columns/After_jail__arts_pave.shtml 8

Lonnae O'Neal Parker, *From Inmate to Mentor, Through Power of Books*, Wash. Post, Oct. 2, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/01/AR2006100101160.html 8

T.J. Parsell, *FISH: A Memoir of a Boy in a Man's Prison* (2006) 8

Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., 1999), *available at* http://www.cjcj.org/files/secondchances.pdf 8, 31

Mike Sonksen, *The Redeemer Speaks*, O.C. Weekly, Dec. 1, 2005, *available at* http://www.ocweekly.com/2005-12-01/culture/the-redeemer-speaks// 8

INTEREST OF *AMICI CURIAE*[1]

The *Amici* who submit this brief are former juvenile offenders who were able to become productive, law-abiding adults and make meaningful contributions to society. *Amici* believe that their experiences may assist the Court in resolving the difficult issues presented by these cases by providing insight into the unique capacity of children to rehabilitate themselves.

As juveniles, *Amici* in many ways resembled Joe Harris Sullivan and Terrance Jamar Graham, the petitioners in this case. Each of them engaged in serious criminal conduct. Some of them were convicted of crimes that, in Florida and elsewhere, are punishable today by life sentences. Others committed acts that quite easily could have led to such a conviction had circumstances been different or had a prosecutor taken a harder line.

Yet because *Amici* were not sentenced to life imprisonment – because they ultimately were given another chance, in part because of the young age at which they had committed criminal offenses – they were able to make significant contributions to their communities and even, in some cases, the nation and the world. The life stories of the *Amici* show how much could have been lost by concluding too quickly

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

that they were beyond hope. *Amici* seek to share their individual stories with the Court.

Charles S. Dutton attended Yale University's School of Drama. He made his Broadway debut in 1984 and has received two Tony nominations. He also has starred in several major motion pictures and a television series, and won an Emmy for directing the HBO mini-series "The Corner."

Alan K. Simpson served in the United States Senate from 1979 to 1997, serving, among other positions, as Republican Whip and Chairman of the Veterans Affairs Committee. He has also served several terms in the Wyoming legislature, directed Harvard University's Institute of Politics, and participated in the Iraq Study Group.

R. Dwayne Betts is a published author and poet. He recently graduated from the University of Maryland, College Park, where he was selected for the honor of delivering a commencement address.

Luis Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books, including his memoir, *Always Running: La Vida Loca, Gang Days in L.A.*, which has won numerous awards. He has also published articles in leading newspapers, and he founded Youth Struggling for Survival, a community organization for troubled youths in Chicago.

Terry K. Ray attended Luther College and the Northwestern University School of Law. He has served as a trial attorney for the Department of Justice Tax Division and as an Assistant United States Attorney, prosecuting tax crimes. Today he is a white-collar defense attorney in Dallas. He has participated in and initiated mock trials at inner city

schools and received a grant from the State of Illinois to teach youngsters in the Venice School District how to resolve conflicts without resorting to violence.

T.J. Parsell is a successful software executive and one of the country's leading advocates against prison rape. He authored a book about his experiences in prison, *FISH: A Memoir of a Boy in a Man's Prison*, which was published in 2006. This fall he will enter the graduate film school at New York University.

Ishmael Beah is a United Nations Children's Fund (UNICEF) Advocate for Children Affected by War. He speaks at conferences on children's welfare around the world. A graduate of Oberlin College, he has written a memoir, *A Long Way Gone*, which has become an international best-seller.

Although they are now successful adults, *Amici* made terrible mistakes as teenagers. They are living, breathing testaments to the resiliency, adaptability, and rehabilitative potential of juvenile offenders.

SUMMARY OF ARGUMENT

As the experiences of *Amici* show, it is fundamentally inhumane to give up on a youthful offender. The same distinctive characteristics of youth that render capital punishment unconstitutional for juvenile offenders make it equally improper to sentence them to life in prison without the possibility of parole. As this Court recognized in *Roper v. Simmons*, 543 U.S. 551 (2005), children are less susceptible to deterrence, less deserving of retribution, and, crucially, much more capable of rehabilitation. Like a death sentence, a

sentence of life in prison without the possibility of parole ignores these important differences between adults and children.

As individuals who committed serious criminal offenses as juveniles but who subsequently have realized their mistakes, atoned for them, and rehabilitated themselves, *Amici* are uniquely situated to provide insight into the difficult issues presented in these cases. One of the *Amici* has helped to enforce the laws of the United States; another helped to write them. Others have made important national and even international contributions to social justice, culture and the arts, and business. Their stories, and the stories of others like them, prove that no matter how broken their spirit, nor how violent their actions, juveniles can be redeemed and can make contributions to society that would be tragic to lose. It is impossible to know what any juvenile offender will grow up to become. But it is also impossible to conclude that any juvenile offender has no redeeming potential, and therefore should be locked away for life with no possibility of parole. Although *Amici* come from a variety of backgrounds, each of them understands firsthand and proves the limitless potential of young people to change. They speak today with one voice and urge this Court to rule in Petitioners' favor in these cases.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT.

This Court has repeatedly endorsed the view that juveniles are "categorically less culpable than

the average criminal." *Roper*, 543 U.S. at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). In *Roper*, the Court pointed to three "general differences" between juveniles and adults that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S. at 569-70. First, juveniles' immaturity and susceptibility to irresponsible behavior makes their irresponsible conduct less morally reprehensible than that of adults. *Id.* Second, juveniles are more vulnerable to negative environmental influences and pressures, including peer pressure. *Id.* at 569. This vulnerability, combined with a relative lack of control over their immediate surroundings, allows greater forgiveness to juveniles for bad behavior. *Id.* at 570. Finally, juvenile personalities are not fully developed. The signature qualities of youth are transient, leaving open the possibility of maturity and personal growth. *Id.* at 569-70.

This Court has also explained that punishments are justified under one or more of three principal rationales: retribution, deterrence, and rehabilitation. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008). In *Roper*, this Court recognized that the first two of these justifications apply to juveniles "with lesser force" than to adults. 543 U.S. at 571. The case for retribution is less strong for a minor because the culpability and blameworthiness of juveniles is significantly diminished by their youth and immaturity. *Id.* These same characteristics also

suggest that juveniles will be "less susceptible to deterrence." *Id.*

The third justification for punishment – rehabilitation – is of course not applicable to a sentence of life imprisonment without parole, just as it does not apply to the death penalty. Yet the same characteristics that decrease the culpability of juveniles and make them less susceptible to deterrence increase their prospects for rehabilitation. As the Court noted in *Roper*, the reality that juveniles are still in the process of defining their identity diminishes the presumption that a heinous crime is evidence of irretrievably depraved character. *Id.* at 570. It would be misguided to equate the failings of a minor with those of an adult, "for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* The incredible potential for such reformation is the focus of this brief.

When a juvenile offender commits a serious criminal offense, the State retains authority to take basic liberties away from that offender. *Id.* at 573-74. What the State cannot do, however, is to "extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* This brief provides examples of the important contributions that can be made by youth when they are given a second chance – the chance to attain a mature understanding of their own humanity, and to share it.

These examples are necessarily anecdotal. Undoubtedly there are many more former juvenile offenders with stories like those of the *Amici*, just as there are others who do *not* go on to become

Senators, authors, and human rights activists. However, the examples set forth in this Brief do dramatically illustrate that the goals of rehabilitation, deterrence, and retribution are *not* served by sentencing juveniles to life in prison without parole. Had the *Amici* received such sentences, they never would have had the opportunity to discover and cultivate their impressive talents, and society never would have benefited from their undeniable contributions.[2]

II. THE LIFE STORIES OF THE *AMICI* SHOW THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT AND THAT INCARCERATING A YOUTHFUL OFFENDER FOR LIFE WITHOUT PAROLE CAN BE A TREMENDOUS LOSS TO SOCIETY.

A. Charles S. Dutton

Charles S. Dutton is one of the nation's most respected actors and directors. He has received two Tony Award nominations for his performances on the Broadway stage and has been honored with Emmy Awards for his acting and directing on television.

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[2] *Amici* do not condone in any way the crimes committed by the petitioners in the cases before the Court. Nor are *Amici* in a position to evaluate the appropriate criminal sanctions that these particular defendants, or any other defendants convicted of serious offenses, should receive for their crimes. Strong criminal sanctions, including lengthy periods of incarceration, often are appropriate for individuals who have committed serious criminal offenses. However, *Amici* also strongly believe that when a juvenile commits a crime, even a serious offense, a constitutional system of justice cannot conclude that no possibility of rehabilitation exists and that the only recourse is a term of life imprisonment without the possibility of parole.

Yet his path to success did not begin at the Yale School of Drama, from which he earned his Masters of Fine Arts degree, but years earlier, during his third and final stint in Maryland State Prison.

Dutton grew up in the Latrobe Homes housing projects in Baltimore. His childhood bedroom overlooked the Maryland Penitentiary, an imposing and dark gothic structure built in the early 1800s. Dutton saw that prison every day and night from birth. "We all expected to end up there," he says, "because all the older guys we knew were there. It was as if I was born for it."[3]

Dutton was first sent to a juvenile reform school when he was thirteen, and he bounced around the juvenile system for several years. "I thought there

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[3] *Amici* speak directly to the Court in this Brief, and each adopts the statements attributed to him herein as his own. However, the stories of the *Amici* have been told before in a wide spectrum of public media. *See, e.g.*, Ishmael Beah, *A Long Way Gone* (2007) (Ishmael Beah); Ernest Hooper, *After Jail, Arts Pave Way Back Into Life*, St. Petersburg Times, Sept. 14, 2007, *available at* http://www.sptimes.com/2007/09/14/Columns/After_jail__arts_pave.shtml (Charles Dutton); *Second Chances: 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice* at 35, 41 (Justice Policy Institute & Children and Family Justice Center, 1999), *available at* http://www.cjcj.org/files/secondchances.pdf (Alan Simpson and Terry Ray); T.J. Parsell, *FISH: A Memoir of a Boy in a Man's Prison* (2006) (T.J. Parsell); Lonnae O'Neal Parker, *From Inmate to Mentor, Through Power of Books*, Wash. Post, Oct. 2, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/01/AR2006100101160.html (Dwayne Betts); Mike Sonksen, *The Redeemer Speaks*, O.C. Weekly, Dec. 1, 2005, *available at* http://www.ocweekly.com/2005-12-01/culture/the-redeemer-speaks/ (Luis Rodriguez).

was more going on in the street corner than in the classroom." In order to look "tough" to his cohorts, Dutton felt the need to be imprisoned in more and more severe establishments, in what he describes as a "morbid rite of passage." "You gained 'rep' by being tough. If you were in City Jail, people would say, 'you ain't tough. You need to go to the Farm, or the Cut," slang for other Maryland detention facilities. "You ain't done nothin'."

When he was seventeen, Dutton was involved in a street fight that escalated into a knife fight. He and his assailant stabbed each other. Only Dutton survived. He was convicted of manslaughter and sentenced to five years of imprisonment. Dutton was out on parole for only a few months when he returned to prison for possession of a deadly weapon (a handgun). When a prison riot broke out, Dutton participated and punched a guard. He was sentenced to an additional eight years of imprisonment. "I knew what I was doing," he says. "For a long time I didn't want to hear anything positive. I just wanted to know when we were going to burn down the prison."

In 1974, during his last prison stint, Dutton was put in the "hole" – solitary confinement – for refusing to clean toilets. He was fed only every seventy-two hours. "The only thing you were allowed to bring with you into the hole was one book. I brought in an anthology of plays that my girlfriend sent me from the outside. I had meant to grab a different book, actually, but took the plays by mistake," he says. "For the first three days, I couldn't read it. The hunger hurt too badly. But after that, by the light that shone through the two inches between the door

and the floor, I lay flat on my stomach and read for days." One play in the anthology was *A Day of Absence* by the famous African-American playwright Douglas Turner Ward. "Reading that play sparked me in a way that allowed me to rediscover my own humanity," Dutton recalls.

When Dutton left "the hole," he convinced the warden and a prison teacher, who was also a local actress, to start a prison drama program. Preparing for the group's weekly meetings and rehearsals gave him purpose. While in prison, he received his G.E.D. and then an Associate's Degree in theater. After his release, he earned a Bachelor's Degree in theater from Towson State University and acted for two years in Baltimore. He applied and was accepted to Yale University's School of Drama – one of the top drama schools in the country. "When I used to wander the campus at night, looking at the buildings and statues, I used to think, 'wow, I don't believe this.' I have that same feeling today when I shoot a film or perform on a Broadway stage."

Dutton made his Broadway debut in 1984 in August Wilson's "Ma Rainey's Black Bottom," a performance that earned him a Theater World award and the first of his two Tony nominations. In 1991, Towson State University bestowed him with an honorary doctorate degree. Dutton has co-starred in several major motion pictures, and from 1991-1994 starred in the television series "Roc." In 2000, Dutton earned an Emmy Award for directing the acclaimed HBO mini-series "The Corner."

Dutton emphasizes that his redemption is not unusual. "I have buddies who are plumbers and brick masons and carpenters who've been out as long

as I've been out and been as productive with their lives," he says. He firmly believes the chance for a productive life is at its height with juvenile offenders. "I just can't fathom sentencing juveniles to life without parole," Dutton says. "I just talked in Florida to some kids with that sentence. It was just dawning on them after ten or twelve years that their lives were over. They were kids and now they're finished. There's a heart-wrenching sadness on their faces, and you can see the fight is out of them. If they were given a second chance, they'd be changed human beings."

"As long as it's a young mind," he says, "they're salvageable. At those tender ages, the mind is still pliable and can be shaped. It's not too late."

B. Senator Alan K. Simpson

Alan K. Simpson is an accomplished former Member of the United States Senate and a leader of the Republican Party. He served in the Senate for eighteen years, from 1979 to 1997, rising to become the Republican Whip. When Simpson announced his candidacy for the Senate in 1977, one man stood out in the crowd: J.B. Mosley, Simpson's probation officer. When Simpson was a juvenile – long before he finished college, law school, and eventually became a candidate for the Senate – Simpson was convicted of a serious federal offense and engaged in other conduct that could have led to other serious criminal offenses and, under certain regimes, a potential life sentence. In Simpson's words to this Court, "I was a monster."

One day in Cody, Wyoming, when Simpson was in high school, he and some friends "went out to do

damage." They went to an abandoned war relocation structure and decided to "torch" it. They committed arson on federal property, a crime now punishable by up to twenty years in prison if no one is hurt, *see* 18 U.S.C. § 844(f)(1), and punishable by up to life in prison if the arson causes a person's death, *see id.* § 844(f)(3). Luckily for Simpson, no one was injured in the blaze.

Simpson not only played with fire, but also with guns. He played a game with his friends in which they shot at rocks close to one another, at times using bullets they stole from the local hardware store. The goal of the game was to come as close as possible to striking someone without actually doing so. Again, Simpson was lucky: no one was killed or seriously injured.

Simpson and his friends went shooting throughout their community. They fired their rifles at mailboxes, blowing holes in several and killing a cow. They fired their weapons at a road grader. "We just raised hell," Simpson says. Federal authorities charged Simpson with destroying government property and Simpson pleaded guilty. He received two years of probation and was required to make restitution from his own funds – funds that he was supposed to obtain by holding down a job.

J.B. Mosley became Simpson's probation officer. Simpson resisted Mosley's efforts, earning money at the local pool hall and reporting to Mosley (sarcastically) that he was going to "choir practice." One late night in Laramie, Simpson arrived at a bar popular with African-Americans. He saw a man leaving the bar who had just been in a knife fight inside. Simpson asked what happened. The man

uttered racial slurs, and Simpson responded that, with that attitude, the man was at the wrong bar. The man attacked Simpson and Simpson shoved the man down – just as the police arrived.

The police separated the men and, believing Simpson was responsible for the man's knife wounds, attempted to arrest Simpson. In his words, Simpson then "belted the cop" who was holding him. The officer responded by striking Simpson in the head with a billy club. As Simpson reports, "I still carry a lovely little crescent above my eyebrow as a reminder of how stupid one can get." The officers arrested Simpson and locked him up. His girlfriend (and now wife of fifty-five years) refused to bail him out. Simpson spent the night in a "sea of puke and urine."

For Simpson, that night triggered what he describes as "creeping maturity" – a resolve that he would avoid further trouble with the law and become a productive member of society. As he has described it, "The older you get, the more you realize . . . your own attitude is stupefying, and arrogant, and cocky, and a miserable way to live." With the help of Probation Officer Mosley, Simpson began to redeem himself.

Simpson went on to graduate from the University of Wyoming with a Bachelor of Science degree in 1954 and a law degree in 1958. He served in the United States Army from 1954 to 1956, in various state-level attorney positions from 1958 to 1959, as a United States Commissioner from 1959 to 1969, as a private attorney for many years, and as a member of the Wyoming House of Representatives from 1965 to 1977. He and his wife Ann also raised three children.

Simpson was elected to the United States Senate in 1978. During his tenure, he served as Republican Whip from 1984 to 1994, and he was considered as a potential candidate for Vice President in 1988. He served principally as Chairman of the Senate Veterans Affairs Committee, and also held many other posts in the Senate.

Simpson declined to run for reelection in 1996 and went on to teach at and later to direct the Institute of Politics at Harvard University's John F. Kennedy School of Government. In 2006, he was a member of the Iraq Study Group. He has been an outspoken advocate for equality for all persons regardless of race, color, creed, gender, or sexual orientation. Among many other honors, Simpson has received Honorary Doctor of Laws degrees from the University of Wyoming, Notre Dame, and American University, as well as the Thomas Jefferson Award in Law at the University of Virginia.

Alan Simpson was involved in activities as a youth that could have led to a lengthy prison term. He engaged in felonious and violent conduct that posed a serious risk to life and property. Had circumstances been different – had he not been fortunate regarding where his stolen bullets struck or what was damaged by his arson – he might have been jailed for the rest of his life. But the system did not treat him so harshly. It gave him a second chance, including the help of a probation officer who, in Simpson's view, had a great influence on his life and helped him make it to the moment where he stood before a crowd in Wyoming, asking to be elected to the United States Senate.

C. R. Dwayne Betts

On May 21, 2009, Reginald Dwayne Betts became his family's first college graduate when he received his bachelor's degree in English from the University of Maryland. He had the honor of being chosen to give a commencement address at graduation. Standing before thousands of spectators and his fellow graduates, Betts recalled a day twelve years earlier when he stood as a teenager in a Virginia courtroom and was sentenced to prison. "My journey," Betts said, "began the moment my life became a derailed train headed toward the state penitentiary."

In 1997, sixteen-year-old Betts and a friend took a joyride in a stolen car. They came across a man asleep in his car near a Northern Virginia shopping mall and decided to carjack the man. Betts had a gun. He pointed it at the car window, stole the man's wallet, and drove off with the car. Betts was arrested the next day. Asked later about his motivations, Betts said, "I did it for all kinds of reasons I can't clearly reason out. At that moment I wanted to do it, and I had no idea that it would define me for the rest of my life."

Betts was convicted of carjacking, use of a firearm during a felony, and attempted robbery. Although he had never before been arrested, he was certified as an adult. He faced a possible life sentence, but was sentenced to fifteen years for carjacking, five years for attempted robbery and three years for the use of a firearm in the commission of a felony. After the judge suspended all but six years of the fifteen-year sentence, and ran

it concurrently with the five-year robbery sentence, Betts was left facing a nine-year prison sentence. He recalls the judge saying, "I'm under no illusions that sending you to prison will help you."

Prior to his arrest, Betts had drifted between his school life and his social life. An avid reader, he qualified for his school's gifted program, made the honor roll, and was elected class treasurer. But Betts was restless and, as his mother noted, thought he could talk his way out of anything. His group of friends consisted of boys who were mainly failing, so Betts hid his college potential and aspirations. Although he remained on the honor roll and excelled in his honors classes, Betts began to get into trouble. He started getting high with the boys in his neighborhood after school. Over time, his drug use increased and he began cutting classes. Nevertheless, his mother and teachers did not notice his downward spiral, because he continued to excel in class. Looking back, Betts says, "I guess I didn't set off any alarms in anybody's head."

After his arrest, Betts "closed my eyes hoping it would go away." But of course it did not, and he soon realized he would remain locked up for a long time. He spent the rest of his adolescent years trying to maintain his sanity and sense of self, living in a prison environment ruled by violence. In that world, Betts learned, "you are either predator or prey." During his first two years in prison, Betts spent almost a full year in solitary confinement for what he calls "incidental contact with correctional officers." Although solitary protected Betts from the danger of always being the youngest person in the room, his constant fears of violence gave way to a worry that

prison would harden him, would turn him into someone he knew he was not.

As he had done as a child, Betts escaped into books. He began writing as well to pass the time. He wrote to his mother every week, and he started writing essays and poetry. Betts knew that one day he would be released back into society, and he did not want to have wasted the years he was incarcerated. He knew he needed a skill once he was released from prison, and he focused on writing. "I took everything seriously because I knew I had a release date," he says. "I wrote my way out of that world."

Betts says that "if I had gotten life without parole, I would never have written those poems and essays." There is an "absolute loss of hope" for juveniles sentenced to life in prison, and "no push to do anything at all." Betts met several such inmates while in jail, and none of them tried to develop skills or improve themselves. Instead they became "part of that world, predator or prey," uninterested in doing anything constructive with their lives.

Betts now has been out of prison for four years. He is making the most of his second chance. "Prison gave me a skill to market, and a story to tell," he says. "I had seventeen hours a day for nine years just to read, study, and exercise – all to prepare for my release." Since his release, Betts has proved he can be a productive member of society. He is, indeed, "not the person I was when I was locked up."

After his release, Betts enrolled at Prince George's Community College. He served in the student government, was the Phi Theta Kappa honor society president, and edited the college's literary

journal. His grades earned him a spot in the school's Honors Academy and a full tuition scholarship to attend the University of Maryland. "The reason why I'm here today is because there were a number of people willing to give me a chance, who were willing to say 'no' to the voices that said I wasn't good enough," Betts has said. "To say 'no' to the voices that said I didn't deserve a chance."

His poetry has been published in several national magazines and journals, and he has won a number of writing contests and scholarships, including the Breadloaf Writer's Conference scholarship and a Holden Fellowship to attend the graduate program at Warren Wilson College. Later this year, Betts will publish a memoir, "A Question of Freedom," as well as a book of poetry. He is married and has a child.

Betts also has worked to give back to his community. At Karibu Books in Bowie, Maryland, Betts started a book club for young boys, to provide a space where the boys could read and share their thoughts about literature and life. Betts wanted to provide the boys with the kind of role model that he never had, so that they could avoid the mistakes he made. Betts also teaches poetry workshops for middle school students in Washington, D.C., as part of the D.C. Creative Writing Workshop.

Betts is remorseful for his actions and grateful for the opportunity to prove that he is not a criminal at heart, not a menace to society. "I made one mistake," he says. "It was not the sum total of who I was." He knows how fortunate he is to have this second chance. "It's difficult to see, right after trouble, that someone is deserving of an

opportunity," he says. "People are dying from the lack of opportunity every day. I'm very blessed."

Knowing that he would have another chance – that he had a release date – is what motivated Betts to work hard to prepare for life after prison. "I always knew I'd have this day, standing on a porch, looking outside," he muses. "Without that, there would just be no reason to think about life beyond a jail cell."

D. Luis Rodriguez

Luis Rodriguez was stealing things by the time he was seven years old, and at the age of eleven, he joined Las Lomas, a Los Angeles gang. As a teenager, Rodriguez says, "I was destructive and self-destructive. I was willing to shoot, stab and even kill for the gang – and I was willing to die for the gang as well. My world was extremely limited and I ended up becoming small to fit in this world."

Beginning when he was thirteen years old, Rodriguez repeatedly was arrested for stealing, fighting and disturbing the peace. He also became addicted to drugs. By age fifteen, Rodriguez had been expelled from school and thrown out of his house by his mother.

When Rodriguez was seventeen, a member of his gang was assaulted by a neighborhood club of white bikers. Rodriguez, deeply ensconced in gang culture, addicted to heroin, and seeking retaliation, shot one of the bikers. He was arrested as he fled the scene and was charged with assault with the intent to commit murder. Although those charges were dropped, a year later Rodriguez faced a six-year prison sentence for assaulting a police officer and

resisting arrest. Instead of giving up on him, the criminal justice system – based partly on letters of support from community members – gave him another chance, directing him to a county jail based on a lesser conviction.

Rodriguez has spent his life paying back the second chance he was given and doing so in spades. At nineteen, Rodriguez broke free of his drug addiction and took a series of low-skill jobs. Over the next four years he worked at Bethlehem Steel, with various periods spent as a carpenter, mechanic, foundry smelter, paper mill worker, and truck and school bus driver. He went back to complete high school, and after taking night classes at East L.A. Community College worked as a reporter and photographer for local weekly newspapers. He subsequently was accepted into a summer program for minority journalists at Berkeley, and at the age of twenty-six was hired as a daily reporter for the *San Bernardino Sun.*

Today, Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books of fiction, nonfiction, literature, and poetry. In 1993, Rodriguez wrote his memoir and signature work *Always Running: La Vida Loca, Gang Days in L.A.*, which he dedicated to twenty-five close friends who died during his gang days. The book, intended to steer Rodriguez's son away from gang life, has sold more than 300,000 copies, and received numerous accolades, including being named a *New York Times* Notable Book, and receiving the Carl Sandburg Literary Award and a *Chicago Sun-Times* Book Award. His freelance journalism has appeared in *U.S. News & World Report, The Chicago Tribune,*

The L.A. Times, and *The New York Times*. Rodriguez also has appeared on National Public Radio, the Oprah Winfrey Show, Good Morning America, CNN, BBC, Fox TV News, and Jim Lehrer's NewsHour.

Returning full circle, in 1994 Rodriguez helped found Youth Struggling for Survival, a community organization that works with gang and non-gang youth in Chicago. He believes that "if properly seen, mentored, assisted, guided, and initiated, young people have immense capacities for change and transcendence. I have seen this in the work I do with gang and other troubled youth, as well as in my own teen years when I left the gang and drugs, including heroin." Today, he testifies as a gang expert and has filed affidavits and appeared in over fifty cases. Rodriguez also spends time speaking in juvenile facilities, prisons, homeless shelters, and detention centers. He says, "Adults today give up on youth when the going gets rough. Youth is youth for a good reason. Youth are very malleable and it is society's obligation to try to change them. I am living proof of the capacity for change."

E. Terry K. Ray

In 1961, eleven-year-old Terry Ray entered Chicago's primary juvenile detention center, the Audy Home, after injuring a friend during a neighborhood rock fight. Ray had regularly been abused at home. Over the years that followed, Ray's anger swelled and he committed a series of increasingly violent offenses.

As a youth, Ray bore all the hallmarks of an incorrigible, recidivist violent criminal. He

repeatedly fought with other students, at times responding with extreme violence to the slightest provocation. At age eleven, he stabbed a classmate in the leg with scissors, and then stabbed the teacher who tried to break up the fight. He attached a combination lock to a metal chain and then pummeled another student with it. One day when he was sixteen, he marched toward his school with a gun, intending to attack a teacher. An alert police officer intercepted Ray, beating him severely. "I was a very violent young man," Ray says. "I was a very angry young man."

Ray spent his teen years drifting in and out of the juvenile justice system. For Ray, incarceration meant stability and safety. It meant protection from the abuse he faced at home. He explains, "I felt much, much better locked up than on the streets. The food was better. The living conditions were better. I had friends."

After his final release from juvenile detention, Ray enrolled in a junior college and took a job as an orderly at a local hospital. One counselor at the college recognized that he had significant academic potential and encouraged him to avoid further trouble by leaving Chicago to complete his education. Ray listened, transferring to and eventually graduating with honors from Iowa's Luther College. He then attended Northwestern University School of Law. After graduating, Ray earned a Master of Legal Letters degree in taxation from Washington University School of Law.

Despite these degrees, Ray initially had trouble finding a job. After he had worked for fourteen months for an insurance company, two law school

professors helped him arrange for an interview with the Department of Justice Tax Division in Washington, D.C. Ray – who at one point had seemed destined to spend his adult life in and out of prison – became a trial attorney for the United States. He later became an Assistant United States Attorney, prosecuting street crime cases in Washington, D.C., and eventually was hired to lead the Tax Fraud Prosecution Unit in the U.S. Attorney's Office in Dallas, Texas. When he left that post in 1987, the Internal Revenue Service thanked him for his service by making him an honorary special agent.

Ray is now an attorney in private practice in Dallas. Throughout his career, he has reached out to juvenile offenders and at-risk youths, teaching them to resolve conflicts without resorting to violence. "Sometimes we don't take the time to look at someone as an individual," Ray says. "We look at something a person did in one second, five seconds, or ten minutes and say that the person has no possibility of ever overcoming that moment. But those people who make it out – they have an extra gear, and they can do remarkable things."

F. T.J. Parsell

T.J. Parsell is a successful software executive, author, and human rights activist. But after convictions for larceny and armed robbery as a juvenile, his life might have been quite different.

Parsell grew up in Michigan, raised by a family with a "long history of trouble." As he relates, "my grandfather, father, uncle, brother, and stepbrother all served time in a juvenile reform school or went to

prison." Parsell describes a family with "twisted ethics" – where it was almost expected that he would end up behind bars.

In 1978, Parsell was seventeen and worked at a hotel, and so he had keys to all of the guest rooms. He often invited friends to drink alcohol, party, and stay the night in the empty rooms. He even stole items from occupied rooms. He was caught and agreed to plead guilty in exchange for probation. The larceny charge could have carried a ten-year prison sentence. *See* Mich. Comp. Laws § 750.356. While out on bail for that offense, Parsell held up a Photo Mat with an imitation gun and stole money from the proprietor. Parsell was arrested the following day and charged with armed robbery, a crime for which he could have spent the rest of his life in prison. *See* Mich. Comp. Laws § 750.529.

The state courts sentenced Parsell as an adult to two-and-a-half to four years of imprisonment on the larceny charge (because Parsell already had violated any probation he might have been granted) and delayed sentencing on the armed robbery for several months. While in the county jail, awaiting assignment to a state prison, Parsell met with the prison psychologist who informed him that because he had not yet been sentenced for armed robbery, and because armed robbery could subject him to a life sentence, Parsell would be "going inside" – meaning "inside the walls of maximum security." After the psychologist noted that Parsell was "dangerous," Parsell was transferred to the Riverside Correctional Facility – "a close-custody prison for inmates serving long sentences, usually ten or more years."

Parsell was terrified. When he arrived at Riverside, he "felt a sudden urge to scream," but kept it hidden. "I could not let the other inmates see how the sight of the prison's massive walls hit me like I was entering a slaughterhouse." On his first day in the general population, an inmate spiked Parsell's drink with Thorazine, a powerful sedative. Parsell was dragged to a cell, where four inmates gang-raped him. They flipped a coin to see who would "own" him for the rest of his prison time. Only a few weeks earlier, Parsell was reading comic books at home. Now, after stealing property from a Photo Mat, Parsell was the property of another person: an inmate nicknamed Slide Step, who won the coin toss.

Parsell was then transferred back to county jail for sentencing on his armed-robbery charge. Here, outside of Slide Step's "protection," Parsell was gang-raped even more brutally than he had been at Riverside. When the probation officer preparing his presentence report made a sexual advance, Parsell rebuffed it. He then received a harsh sentencing recommendation, and the judge sentenced him to four-and-a-half to fifteen years in prison.

Parsell was transferred to a medium-security facility called the Michigan Training Unit, which stressed rehabilitation. It helped Parsell turn his life around. "The school and the library became my sanctuaries," he reports. A woman named Miss Burt, the classification director, was starting a prison newspaper. "She brought her passion for making a difference to the position, and so she stood out," he recounts. "She was like an angel." Simply by calling Parsell by his first name (Tim), she made him "believe that I was human again." As he recalls,

"what a difference it made to be treated with dignity in a place that didn't seem to value it much."

Parsell wrote for the prison newspaper – called the *Oracle*, because the inmates on the paper analogized Miss Burt to a priestess "through whom a deity is believed to speak." Recounting Miss Burt's impact, Parsell says: "Here was this woman, a black woman in a man's world, who was better educated than anyone I'd ever known. She stuck up for me as my mother never had. Now that I was getting an education I was starting to understand what it meant not to have one." Finally, Parsell says, "I could see that through education there was possibility." Parsell completed his G.E.D. and twenty months of his college education in prison.

Parsell left prison in 1982. He took a typing job – "it was my only marketable skill" – and put himself through night school to complete his undergraduate degree. He graduated with honors from St. Francis College and went on to work in the software industry. "I got therapy, I got sober, and I started to do well." He went on to become a top executive at several technology firms, ultimately rising to become vice president of sales at a major publicly traded software company.

Following his brother's death and the September 11, 2001 terrorist attacks, Parsell made a decision to confront issues he long had repressed. "I felt extremely fortunate to have been able to transcend the mistakes of my earlier life." He decided to write and talk about his experiences in prison. His memoir, *FISH: A Memoir of a Boy in a Man's Prison* (Carrol & Graf), was published in 2006 and won the Pass Award for Literature by The National Council

on Crime and Delinquency. Since then, Parsell has become one of the nation's leading advocates against prison rape. He is president of the human rights group Stop Prisoner Rape. He worked with the Justice Department to set up the National Prison Rape Elimination Commission and with the Bureau of Justice Statistics and the National Institute of Corrections on various ways of quantifying and preventing prison rape. He helped produce an inmate orientation video, which is shown to all new incoming prisoners in the United States, outlining ways in which inmates can avoid prisoner rape.

This fall, Parsell will enter the graduate film school at New York University. He plans to turn his memoir into a feature film. Unsurprisingly, "being a poster child for prisoner rape was not high on my list of ambitions," Parsell says. "I'm taking back the voice that was stolen from me when I was seventeen years old. And I know that others, no matter how far down a wrong path they may have gone, or how far they've fallen, can do the same."

G. Ishmael Beah

Like the other *Amici*, Ishmael Beah is today a highly accomplished individual who is making the world a better place. His background is very different from the others, however, and far more extreme. In a foreign country, as a literal child-soldier in a militia army, Beah engaged in the atrocities of murder and torture. But his story equally illustrates the potential of youth to grow and change.

Today Beah is a best-selling author, a United Nations Children's Fund (UNICEF) Advocate for

Children Affected by War, and a member of the Human Rights Watch Children's Rights Division. He has devoted his adult life to advocating rehabilitation for children who have committed brutal acts, focusing on the amazing capacity of young people to transform their lives.

Beah grew up in Sierra Leone, and his home region was engulfed in warfare in his early teenage years. After the death of his family, he tried to flee to safety until he was forced to join the government army, as this became the only way to ensure his survival. He was initially reluctant to be a soldier, but rapidly became accustomed to the extreme violence that surrounded him. At age thirteen, he learned to fire a gun, to handle a bayonet, and to find motivation by focusing on his hatred for the rebel army, which had killed his family.

In the years after he enlisted, Beah aspired to be a fierce and deadly soldier, modeling himself after the Rambo movies. He practiced beheading rebels with a bayonet; he shot prisoners in their feet and kept them living for hours in excruciating pain before finally killing them; he led small bands of soldiers in massacring entire villages. When Beah was fifteen, UNICEF workers managed to get him out of the army – entirely against his will – and into a refugee camp. On his first night in the camp, as the UNICEF workers looked on in horror, Beah and other former child soldiers started a pitched battle of fists, grenades, and bayonets that eventually left six boys dead. As the UNICEF workers struggled to bring the boys back to some semblance of normalcy, the boys ripped apart furniture, walls, windows, and

anything else they could find, so inured had they become to a lifestyle of violence and ruin.

Looking back on that time now, Beah recognizes that the violence was a way to keep himself from thinking about what he and his family had suffered. But it was only the opportunity given to him by the UNICEF workers that allowed him to "discover himself" and realize that he could be more than a mindless agent of destruction. At the camp, UNICEF workers constantly told Beah that he had been just a boy when he committed his crimes, and that it wasn't his fault. After being given "time and space" to heal, Beah began to come to terms with what he had done as a teenager. He moved to the United States in 1998 and finished his last two years of high school at the United Nations International School in New York. In 2004, he graduated from Oberlin College with a Bachelor of Arts degree in political science. Within a few years, he was speaking at conferences on children's welfare all around the world. In 2007, he published the memoir *A Long Way Gone*, which has become an international best-seller.

Beah's time spent immersed in fighting and acts of criminality gives him a deep sympathy for other children trapped in a similar cycle of violence. Although the circumstances in America are very different from those in Africa, he believes that the forces that push people to criminal activity are fundamentally the same in both places. "Not every child who fights wants to be a child soldier," he explains. "Many have bad home lives and can fall victim to those who would pull them into a life of violence as a solution from their abuse or suffering."

Whether in Florida or Sierra Leone, violence or theft "becomes normalized because it becomes the only way to live." What children see, he believes, is what they will do.

Beah knows that there is no easy solution for juvenile crime, and that different methods are effective for different people. Still, he is certain that a lifetime in prison is not the answer: "There's more trauma in prison than what I'd been put through. Punitive measures for kids just don't help." If Beah had been in an American-style prison, he believes, he would have been left to "push myself into despair, wallowing in the trauma of what happened" instead of getting a chance to discover his own potential and eventually educating the world about African wars and the rehabilitation of child soldiers.

Beah has seen some of the worst things that teenagers can do, if pushed far enough, and he grasps the fundamental similarity between his own life and some of the excruciating histories of juveniles serving life sentences in America. His goal now is to prevent such sentences from being imposed, so that young people like him "can tell others, instead of being locked away."

"Children who commit crimes lack the moral and psychological underpinnings of adults," he says, "but they're also more resilient, so it is very possible to change. And it is only through rehabilitating such children and youth that we are able to learn how to prevent a similar situation from happening to others." Beah's own story illustrates that a youth who has committed even the most horrific crimes can, given another chance, build a joyful and meaningful life. Because he was not judged solely on

who he was as a fifteen-year-old, he says, "I discovered my own potential and have become a productive member of society."

* * * * * * * * *

The stories of the *Amici* are only a handful of countless more that exist, many of which properly are confidential under existing juvenile court rules. Not every juvenile offender goes on to become an acclaimed actor, a United States Senator, a poet, or a software executive. Indeed, not every juvenile offender will be rehabilitated. But because no child is a finished product, every child has the potential to be redeemed, and if given the opportunity many will accomplish great things.

A sentence of life in prison without the possibility of parole, like a death sentence, extinguishes all hope that a juvenile offender might one day contribute to his or her community as have Charles Dutton, Senator Alan Simpson, Dwayne Betts, Luis Rodriguez, Terry Ray, T.J. Parsell, Ishmael Beah, and others like them.[4] "When you get a life sentence, you have no reason to think about the future. You only think about the day to day," says Betts. "If I know I can never get out of prison, that's as good as dead to me," says Dutton. "I would prefer the death penalty to a life sentence without the possibility of parole."

This Court found in *Roper* that juveniles are less culpable than adults, that their minds are not fully developed, and that they are more subject to peer pressure and other environmental factors. *Amici*

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[4] *See Second Chances, supra.*

know from their experiences that, upon attaining adulthood, juvenile offenders often can overcome their troubled pasts.

The Eighth Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). *Amici* submit that evolving standards of decency compel the conclusion that a juvenile offender may not be sentenced to life in prison without parole as punishment for a non-homicide offense. The personality of such an offender is still too unformed, and the potential for productive contributions to society simply too great, to allow such a result. In Senator Simpson's characteristically blunt and common-sense words, "Anybody in our society – unless they are totally out to lunch – can understand that a guy of twenty-five or thirty-five is not the same guy of seventeen. You can't just throw a kid in the clink forever."

CONCLUSION

For the foregoing reasons, the decisions of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,
v.
STATE OF FLORIDA,
Respondent

ON WRIT OF *CERTORARI* TO
THE DISTRICT COURT OF APPEAL OF FLORIDA,
FIRST DISTRICT

BRIEF OF JUVENILE LAW CENTER, NATIONAL JUVENILE DEFENDER CENTER, CHILDREN AND FAMILY JUSTICE CENTER, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

IDENTITY OF AMICI 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Courts Have a Special Duty to Ensure that the Eighth Amendment Adequately Protects Youth 4

A. Supreme Court Constitutional Jurisprudence Recognizes the Unique Developmental Status of Minors 7

1. This Court's Constitutional Jurisprudence Recognizes the Importance of the Transitory Nature of Adolescence for Both Criminal Culpability and Criminal Procedure 7

2. This Court's Constitutional Jurisprudence in Civil Cases Also Takes Account of the Unique Developmental Status of Children 12

3. Social Science Research Confirms the Transitory Nature of Adolescence and the Capacity of Youth for Rehabilitation 15

B. The Supreme Court's Duty Under the Eighth Amendment to Ensure that Penalties Accord with Human Dignity Precludes the Imposition of Life Without Parole on Adolescents..... 20

1. When Considering Juvenile Life Without Parole, this Court Must Take Into Account the Diminished Culpability of Juveniles..... 21

2. Because Life Without the Possibility of Parole Does not Serve a Legitimate Penological Purpose, it is Unconstitutional as Applied to Adolescents..... 26

CONCLUSION..... 35

APPENDIX A.....A1

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INTEREST OF *AMICI*[1]

The organizations submitting this brief work with, and on behalf of, adolescents in a variety of settings, from day care to foster care, substance abuse to homelessness, and at every stage of the juvenile and criminal justice process. *Amici* are advocates and researchers who bring a unique perspective and a wealth of experience in providing for the care, treatment, and rehabilitation of youth in the child welfare and juvenile justice systems. *Amici* know from first hand experience that youth who enter these systems need extra protection and special care, clearly necessitated by their status as youth. *Amici* also know from their collective experience that adolescent immaturity often manifests itself in numerous ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that central to adolescence is the capacity to change and mature. It is precisely for these reasons that *Amici* believe that the status of childhood and adolescence separates youth from adults in categorical and distinct ways that, while youth should be held accountable, youth cannot be held to the same standards of blameworthiness and culpability as their adult counterparts.

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[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

IDENTITY OF *AMICI*

See Appendix "A" for a list and brief description of all *Amici*.

SUMMARY OF ARGUMENT

Petitioners challenge the constitutionality under the Eighth Amendment of an irrevocable sentence of life without parole for youthful offenders who committed non-homicide crimes while under the age of eighteen. *Amici* urge this Court to find these sentences unconstitutional.

This Court's holding in *Roper v Simmons*, striking the juvenile death penalty as cruel and unusual punishment, was the Court's most recent application of the Eighth Amendment to juveniles and reflects a decades-long commitment to considering the special characteristics of youth when construing their rights under the Constitution. While the Court's solicitude for youth is particularly pronounced in cases addressing children's involvement in the juvenile and criminal justice systems, children's unique developmental status has repeatedly been taken into account in determining the scope and breadth of their rights under various provisions of the Constitution that reach into the civil arena as well. This doctrinal approach to determining children's rights under the Constitution must also govern the Court's analysis here.

Additionally, while Roper adhered to this Court's special consideration of youth, its holding was enriched and informed by scientific and

developmental research that confirmed, inter alia, the transitory nature of the characteristics of youth, their diminished criminal culpability and their capacity for change and rehabilitation. This research informs the outcome in these appeals as well.

Lastly, this Court's Eighth Amendment jurisprudence proscribes penalties that do not accord with human dignity. Looking beyond legislative indicia, this Court must exercise its own independent judgment in determining the constitutionality of criminal punishments under the Eighth Amendment. Such independent judgment must consider the diminished culpability of the petitioners and the fact that these life without parole sentences fail to serve any legitimate penological purpose.

This Court's historical youth jurisprudence, informed by research and buttressed by the Court's independent consideration of whether a sentence of life without parole imposed on adolescents comports with human dignity, collectively prohibit the imposition of these sentences on youth who have been convicted of non-homicide crimes committed while under the age of eighteen.

ARGUMENT

I. COURTS HAVE A SPECIAL DUTY TO ENSURE THAT THE EIGHTH AMENDMENT ADEQUATELY PROTECTS YOUTH

The fact that minors are different than adults is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights in both civil and criminal law.

This Court's constitutional jurisprudence confirms that a sentence of life without parole must be assessed in light of the unique developmental status and diminished culpability of youth as a class. While this Court has, of course, considered the constitutionality of the death penalty as applied to youth, *see, e.g., Roper v. Simmons*, 543 U.S. 551 (2005), *Thompson v. Oklahoma*, 487 U.S. 815 (1988), *Stanford v. Kentucky*, 492 U.S. 361 (1989), to date, this Court has not considered an Eighth Amendment challenge to a juvenile sentence other than the

death penalty.[2] The substantive factors underlying the Court's decision in Roper – including the diminished culpability of youth as a class and their innate capacity for change – apply equally here, and also compel the conclusion that imposition of the irrevocable penalty of life without parole for a person who was under 18 at the time of his or her crime is cruel and unusual.

This Court has previously raised the concern that the federal courts must be provided with objective factors with which to assess the constitutionality of criminal sentences. Thus, the difficulty of assessing the gravity of an offense – or comparing the gravity of offenses in various jurisdictions – may pose a barrier to the Court's willingness to determine whether a particular term of years sentence is constitutional. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 959 (1991) (*Kennedy, concurring in part and concurring in the judgment*) ("proportionality review by federal courts should be informed by objective factors to the maximum extent possible...."); *Ewing v. California*, 538 U.S. 11, 23-24 (2003) (describing the "principles of proportionality review" Kennedy laid out in *Harmelin* as guiding the Court's "application of the Eighth Amendment...."); *Coker v. Georgia*, 433 U.S. 484, 592 (1977) ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be

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[2]Because this case rests upon this Court's jurisprudence on youth, it does not require the Court to reach the question of whether in other contexts "death is different" such that death penalty cases require a different and more rigorous analysis under the Eighth Amendment.

informed by objective factors to the maximum possible extent.") Here, however, this Court's previous application of the Constitution to adolescents, informed by medical, scientific and adolescent development research, provides objective factors to guide the Court's reasoning.

This Court's previous cases require the recognition that youth are different from adults in large part because of their capacity to change and their diminished culpability. Criminal sentences that disregard these central distinctions between adolescents and adults, including the death penalty and life without parole, are unconstitutional. In contrast, a sentence of life with the possibility of parole may be constitutional under appropriate circumstances because it would allow for a later individualized assessment of the culpability and dangerousness of a juvenile offender. Moreover, the depth of an adolescent's capacity to change, and in fact the inevitability of change and maturation for an adolescent, distinguishes youthful defendants from all other types of defendants. Indeed, this Court has already established that for the purpose of reduced culpability, the appropriate age to draw the line is age eighteen. *Roper*, 543 U.S. at 554 ("While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest.").

A. Supreme Court Constitutional Jurisprudence Recognizes the Unique Developmental Status of Minors

1. This Court's Constitutional Jurisprudence Recognizes the Importance of the Transitory Nature of Adolescence for Both Criminal Culpability and Criminal Procedure.

The emerging body of research confirming the distinct emotional and psychological status of youth was critical to *Roper v. Simmons*, 543 U.S. 551 (2005), this Court's landmark ruling abolishing the juvenile death penalty. In prohibiting the execution of offenders under the age of eighteen as a violation of the Eighth Amendment's ban on cruel and unusual punishment, this Court relied on medical, psychological and sociological studies, as well as common experience, which all showed that children under age eighteen are less culpable and more amenable to rehabilitation than adults who commit similar crimes. *Id.* at 568-76. This Court in *Roper* reasoned that because juveniles have reduced culpability, they cannot be subjected to the harshest penalty reserved for the most depraved offenders; punishment for juveniles must be moderated to some degree to reflect their lesser blameworthiness.

Central to this Court's determination about juvenile culpability in *Roper* was its understanding that the personalities of adolescents are "more transitory" and "less fixed" than those of adults. *Id.* at 570. This Court further explained that

> Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson[v. Texas*, 509 U.S. 350...], 368, 113 S.Ct. 2658[(1993)]; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

Id. This Court noted that this transient nature of a youth's personality was confirmed by psychological and psychiatric practice:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for

> the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev.2000); see also Steinberg & Scott 1015.

Id. at 573. As a result, this Court's holding rested in part on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow. "[I]t would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. The Court underscored that the state was not permitted to extinguish the juvenile's "potential to attain a mature understanding of his own humanity." *Id.* at 573.

Roper brought a new scientific lens to this Court's Constitutional jurisprudence, relying on recent – and highly informative – developments in research on adolescent development.[3] While *Roper* enriched the

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[3] The Court cited the following articles and studies in its opinion: Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003); Erik H. Erikson, *Identity: Youth and Crisis* (1968). Other studies support the same conclusion. *See also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, *Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88(1) J. Crim. L. & Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth*

constitutional analysis by embedding its reasoning in science, it also built upon this Court's long history of recognizing that there are differences between youth and adults that merit consideration and often different treatment under the Constitution. This body of research, cited approvingly by the *Roper* Court, strongly confirms the longstanding principle that courts must recognize developmental differences between adolescents and adults, and that all youth should be shielded from the harshest consequences of criminal liability.

For example, in *Haley v. Ohio,* this Court recognized that when it comes to criminal procedure, a teenager cannot be judged by the more exacting standards applied to adults. 332 U.S. 596 (1948) (holding unconstitutional the statement of a fifteen-year old defendant). Because minors are generally less mature and more vulnerable to coercive interrogation tactics than adults, they deserve heightened protections under the Constitution. *Id.* The *Haley* Court emphasized the unique vulnerability of youth during the period of adolescence:

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and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation, 21(22) J. Neuroscience 8819, 8819-8829 (2001); Nat'l Inst. Mental Health, *Teenage Brain: A work in progress, A brief overview of research into brain development during adolescence*, NIH Publ'n No. 01-4929 (2001); Kristen Gerencher, *Understand your teen's brain to be a better parent.* Detroit Free Press, Feb. 2, 2005; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

Id. at 599.

This Court has also been explicit that constitutional rights themselves may be – and often must be – defined with reference to an individual's age and developmental status. In *Gallegos v. Colorado*, for example, this Court, considering the admissibility of a juvenile's statement, observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.... Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." 370 U.S. 49, 54 (1962). *See also Haley*, 332 U.S. at 601 ("Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them.") *See also In re Gault*, 387 U.S. 1, 48 (1967) (observing that confessions may be particularly problematic when taken from "children from an early age through adolescence" and that without procedural protections, a confession may be "the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.* at 55.)

This Court has similarly recognized the unique attributes of youth at other key points of their involvement in the juvenile and criminal justice systems. For example, this Court has acknowledged

that a child has a particular need for the "'guiding hand of counsel at every step in the proceedings against him.'" *Id.* at 36 (extending key constitutional rights including the right to counsel to minors subject to delinquency proceedings in juvenile court). This Court has also sought to promote the well-being of youth by ensuring their ongoing access to rehabilitative, rather than punitive, juvenile justice systems. *See McKeiver v. Pennsylvania,* 403 U.S. 528, 539-40 (1971); *Gault*, 387 U.S. at 15-16. *See also* Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court).

2. This Court's Constitutional Jurisprudence in Civil Cases Also Takes Account of the Unique Developmental Status of Children

This Court's special treatment of youth is not limited to their encounters with the juvenile and criminal justice systems. In civil cases, as well, this Court has frequently expressed its view that children are different from adults, and tailored its constitutional analysis accordingly. Reasoning that "during the formative years of childhood and adolescence, minors often lack . . . experience, perspective, and judgment," *Bellotti v. Baird*, 443 U.S. 662, 635 (1979), the Court in a series of cases has upheld greater state restrictions on minors' exercise of reproductive choice. *Bellotti v. Baird*, 443 U.S. 662, 635 (1979), *See also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong

and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."). As a result, this Court has held that a state may choose to require that minors consult with their parents before obtaining an abortion, subject to a constitutionally required bypass procedure, and may take other "reasonable step[s] in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent." *Ohio v. Akron Center For Reproductive Health*, 497 U.S. 502, 520 (1990). *See also Hodgson*, 497 U.S. at 483 (Kennedy, J., concurring in part) ("Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice."); *id* at 458 (O'Connor, J., concurring in part) (holding that the liberty interest of a minor deciding to bear child can be limited by parental notice requirement, given that immature minors often lack the ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (holding that because immature minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

This Court has also held, as a matter of First Amendment law, that different obscenity standards apply to children than to adults, *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), and that the state has a compelling interest in protecting children from images that are "harmful to minors." *Denver Area Educational Telecommunications Consortium, Inc. v.*

FCC, 518 U.S. 727, 743 (1996). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

The developmental status of youth has played a role as well to this Court's school prayer cases. Thus, in holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, this Court observed that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools. *Lee v. Weissman*, 505 U.S. 577, 593 (1992) . In explaining those coercive pressures, the *Weisman* Court contrasted mature adults and children, noting that the latter are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id.* Similarly, in *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000), this Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The opinion stressed "the immense social pressure" on students, *id.* at 311, observing that "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." *Id.* at 312.

In a wide variety of contexts, this Court's constitutional rulings both recognize and respond to

the key developmental differences between adolescents and adults.

3. Social Science Research Confirms the Transitory Nature of Adolescence and the Capacity of Youth for Rehabilitation.

This Court's emphasis on the transitory nature of youth finds support in social science literature. "Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). A central feature of adolescence is its transitory nature. As Scott and Steinberg explain:

> The period is *transitional* because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships.... Even the word "adolescence" has origins that connote its transitional nature: it derives from the Latin verb *adolescere*, to grow into adulthood.

Id. at 32.

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. See Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report:*

Evidence for a Dual Systems Model, 44 Dev. Psych. 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). As a result, "[t]he typical delinquent youth does not grow up to be an adult criminal...." *Id.* at 54. As one report explained,

> More than 30 percent of boys examined in one study committed one or more acts of serious violence by age 18. Few of these youth were ever arrested for violent offenses, but more than three-fourths nonetheless terminated their violence by age 21. Other research has found that the criminal careers of most violent juvenile offenders span only a single year. Understanding this self-correcting dynamic is crucial in any attempt to combat juvenile crime. Most juvenile offenders – even those who commit serious acts of violence – are not destined for lives of crime.

Richard A. Mendel, Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't 15 (2000). Thus, not only are youth developmentally capable of change, research also demonstrates that when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions.

These findings (unsurprising to any parent)

are primarily grounded in behavioral research, but also consistent with recent findings in developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice* 46-68.[4]

While the process of physiological and psychological growth alone will lead to rehabilitation for most adolescents, research over the last fifteen years on interventions for juvenile offenders has yielded rich data on the effectiveness of programs

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[4] *See also* Elizabeth Sowell, et al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, 2 Nat. Neurosci. 859-861 (1999); Nitin Gogtay, et al. *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 Nat'l Acad. Sci. Proc. 8174-8179 (2004), http://www.loni.ucla.edu/~thompson/DEVEL/PNASDevel04.pdf. While it is beyond the scope of this brief to explore the adolescent psychology research comprehensively, it is worth noting that one of the clearest visual representations of these differences can be found at http://www.nytimes.com/interactive/2008/09/15/health/20080915-brain-development.html?scp=1&sq=interactive%20compare%20brain%20development%20in%20various%20areas%20&st=cse, an interactive web-based link allowing visitors to compare brain development in various areas (such as judgment) at different ages. The research demonstrates that while the seventeen year old brain is fairly developed, it is not until age twenty-one that a youth experiences "tremendous gains in emotional maturity, impulse control and decision-making [that will] continue to occur into early adulthood." *Id.* Thus, while there are distinctions between the development levels of older adolescents' brains and those of younger teens, this biological process is not typically complete until a child reaches his or her mid-twenties.

that reduce recidivism and save money, underscoring that rehabilitation is a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders. The Surgeon General has recognized the capacity of violent youth to respond to rehabilitation:

> [E]ffective treatment can divert a significant proportion of delinquent and violent youths from future violence and crime. This finding contradicts the conclusions of scientists two decades ago who declared that nothing had been shown to prevent youth violence. The second major conclusion is that there is enormous variability in the effectiveness of different types of programs for seriously delinquent youth. The most effective programs, on average, reduce the rate of subsequent offending by nearly half (46 percent), compared to controls....

Dep't of Health and Human Services, Youth Violence: A Report of the Surgeon General, ch. 5 (2001), http://www.surgeongeneral.gov/library/youthviolence/chapter5/sec5.html.

Examples of programs shown to be effective with violent and aggressive youth include Functional Family Therapy (FFT), Multidimensional Therapeutic Foster Care (MTFC), and Multi-Systemic Therapy (MST). *See* Peter W. Greenwood, *Changing Lives: Delinquency Prevention as Crime-Control Policy* 70 (2006). All three have been shown to significantly reduce recidivism rates even for serious violent offenders. *See* Charles M. Borduin et

al., *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence* 63 J. Consulting & Clinical Psychol. 569, 573 (1995) (describing the effectiveness of MST in reducing recidivism rates even for serious offenders with histories of repeat felonies); Carol M. Schaeffer and Charles M. Borduin, *Long-term follow-up to a randomized clinical trial of multisystemic therapy with serious and violent juvenile offenders*, 73 J. Consulting & Clinical Psychol. 445, 449-452 (2005) (finding that the benefits of MST often extend into adulthood); Hinton et al., Juvenile Justice: A System Divided, 18 *Crim. Just. Pol'y Rev.* 466, 475 (2007) (describing FFT's success with drug-abusing youth, violent youth, and serious juvenile offenders.); J. Mark Eddy et al., *The Prevention of Violent Behavior by Chronic and Serious Male Juvenile Offenders: A 2-Year Follow-up of a Randomized Clinical Trial*, 12 J. Emotional & Behav. Disorders 2, 2-7 (2004) (describing reduced recidivism rates for violent and chronically offending youth who participated in MTFC).

Indeed, there is compelling evidence that many juvenile offenders, even those charged with serious and violent offenses, can and do achieve rehabilitation and change their lives to become productive citizens. *See* Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., n.d.), http://www.cjcj.org/files/ secondchances.pdf (last visited Jun. 12, 2009) (profiling 25 individuals, including D.C. District Court Judge Reggie Walton and former United States Senator Alan Simpson, who were adjudicated delinquent in juvenile court –

many for violent offenses including attempted murder and armed robbery – and then changed the course of their lives.

B. The Supreme Court's Duty Under the Eighth Amendment to Ensure that Penalties Accord with Human Dignity Precludes the Imposition of Life Without Parole on Adolescents.

This Court has been clear that the decisive question in determining whether a penalty is constitutional under the Eighth Amendment is whether it comports with human dignity. As this Court has explained, "our cases... make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) *citing Trop v. Dulles*, 356 U.S. 86, 100 (1958). The *Gregg* Court further explained:

> Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power.

Id. at 174 n.19. As this Court has repeatedly observed, the Court itself must determine in its "own

independent judgment" whether a penalty is constitutional. *Roper v. Simmons*, 543 U.S. 551, 564 (2005). This analysis is even more vital in the case of youth; as described above, this Court has consistently recognized that youths' unique developmental status informs the constitutional analysis. Thus, for a penalty to be constitutional, it must be appropriately calibrated to the defendant's "personal responsibility and moral guilt." *Harmelin v. Michigan*, 501 U.S. 957, 1023 (1991). For an adolescent, that determination includes consideration of the diminished responsibility and guilt of adolescents as a class. As petitioners have explained, there is a national consensus against imposing life without parole in both cases before the Court today. However, because a penalty that fails to consider the diminished culpability of adolescents as a class is unconstitutional, this Court's analysis need not depend on such a determination.

1. When Considering Juvenile Life Without Parole, this Court Must Take Into Account the Diminished Culpability of Juveniles.

This Court has been clear that for those who *as a class* have diminished culpability, the relevant question under the Eighth Amendment is whether the severity of the sentence can ever be appropriate for a member of the class. Thus, an offender's youth or mental capacity can make certain penalties unconstitutional regardless of the severity of the offense. In *Roper*, this Court concluded that a death

sentence is categorically unconstitutional as applied to any youth under eighteen. The Court explained:

> Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.
>
> We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.

Roper v. Simmons, 543 U.S. 551, 572-73 (2005). Thus, regardless of the brutality of the crime, the death penalty may not be imposed. *Id.* This categorical exclusion protects the vast majority of juveniles whose crimes, even if extremely serious, reflect "unfortunate yet transient immaturity," from receiving an irreversible punishment designed for those whose characters are irreparable. *Id.* at 573. *See also Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (highlighting that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.")[5]

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[5] While the cases resting on a finding of lesser culpability arise in the context of the death penalty, this Court has indicated that categorical culpability is meaningful in other contexts as well. *See, e.g., Robinson v. California*, 370 U.S. 660, 667(1962) (invalidating a statute criminalizing being addicted to the use of narcotics and determining that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual

As a number of state courts have recognized, this same logic dictates holding a sentence of life without the possibility of parole unconstitutional for juveniles. As the Kentucky Supreme Court explained, "[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth. . . ." *Workman v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968). The Nevada Supreme Court has similarly recognized the incongruity of applying a sentence of life without parole to juveniles, observing:

> Before proceeding we pause first to contemplate the meaning of a sentence "without possibility of parole," especially as it bears upon a seventh grader. All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences.

Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989). The court concluded that this was a "severe penalty indeed" to impose upon an adolescent and held that it could not be constitutionally applied to a thirteen-year-old. *Id.* at 944-45.

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punishment for the 'crime' of having a common cold."). While the issue before the Court in *Robinson* was the type of offense, the recognition that addiction alone does not warrant imprisonment also underscores the importance of individual culpability in Eighth Amendment analysis.

Similarly, the California appellate courts have held that an adolescent's capacity to change affects the constitutionality of his or her sentence. The California Appellate Court for the Fourth District, building upon the state's longstanding recognition of the legal differences between youth and adults, recently explained:

> Age also matters..... [T]he perpetrator's age is an important factor in assessing whether a severe punishment falls within constitutional bounds. ([*People v.*] *Dillon*,... 34 Cal.3d [441,] ...479, 194 Cal. Rptr. 390, 668 P.2d 697.) Youth is generally relevant to culpability (ibid.; cf. Cal. Rules of Court, rule 4.413(c)(2)(C)), and the diminished "degree of danger" ([*In re*] *Lynch*, ... 8 Cal.3d [410,]...425, 105 Cal. Rptr. 217, 503 P.2d 921) a youth may present after years of incarceration has constitutional implications (see *In re Barker* ...151 Cal.App.4th 346, 375, 59 Cal.Rptr.3d 746 [(Cal.App.1 Dist., 2007)].
>
> In *Barker,* the court "agreed with the observations of the federal district court in *Rosenkrantz v. Marshall* [...] 444 F.Supp.2d 1063[, 1085] [(C.D.Cal.2006)] that "the general unreliability of predicting violence is exacerbated in [a] case by ... petitioner's young age at the time of the offense [and] the passage [in that case] of nearly twenty years since that offense was committed..."

In re Nunez 173 Cal.App. 4th 709, 726-27 (2009). The Court therefore held that petitioner's youth, in conjunction with other factors, made

unconstitutional the imposition of juvenile life without parole. *Id.* *See also id.* at 736 ("Stated differently by our Supreme Court, the harshness of an LWOP is particularly evident 'if the person on whom it is inflicted is a minor, who is condemned to live virtually his entire life in ignominious confinement, stripped of any opportunity or motive to redeem himself for an act attributable to the rash and immature judgment of youth.'")

Moreover, recognizing the unique developmental status of youth provides this Court with objective and reasoned guidance with which to analyze the cases before it. For juveniles subject to life without the possibility of parole, this Court can follow its previous decisions in acknowledging that: (1) youth are different from adults; and (2) therefore, a penalty which disregards a youth's developmental status by wholly failing to provide for a youth's capacity to change is unconstitutional. Under this second prong, a sentence of life with the possibility of parole may be constitutional under the appropriate circumstances because the parole system in place would allow for a subsequent review of the culpability and dangerousness of a juvenile offender, later grown into a mature adult, and his current state of rehabilitation.

Roper recognized that society's selection of age eighteen as the line between youth and adulthood was also the appropriate line below which youth could not be subject to the death penalty. This accepted view of adulthood also must inform the analysis of life without parole, a punishment that is similarly irrevocable, and also ends in death. 543 U.S. at 572-73. Social science research further supports the decision to draw the line at age

eighteen. While younger adolescents lack the cognitive capacity of older adolescents, sixteen and seventeen year olds actually have *more* problems with risk perception than younger adolescents. Barry Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 35-36 (2008). A study of over 900 individuals aged ten to thirty found that while impulsivity and sensation-seeking decline with age, both preference for risk and inability to perceive it peak at late adolescence. *See* MacArthur Found. Research Network on Adolescent Dev. & Juvenile Justice, Development and Criminal Blameworthiness (2006), http://www.adjj.org/ downloads/3030PPT-%20Adolescent%20Development %20and%20Criminal%20Blameworthiness.pdf. The study concluded that eighteen is the pivotal age at which adolescents' proclivity for risk declines precipitously. *Id.*

2. Because Life Without the Possibility of Parole Does not Serve a Legitimate Penological Purpose, it is Unconstitutional as Applied to Adolescents.

This Court has been careful not to dictate to the states the proper purposes of punishment. *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 25 (2003) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.' [*Harmelin*] at 999, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring

in judgment)). Thus, "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." *Id.*

A state may choose to impose a punishment for purposes of retribution, incapacitation, deterrence, rehabilitation – or any combination thereof. *Id.* A punishment that serves no legitimate penological purpose, however, inflicts needless pain and suffering in violation of the Eighth Amendment. As this Court reasoned in *Coker v. Georgia,* 433 U.S. 584, 592 (1977), "a punishment is 'excessive' and unconstitutional if it...makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *See also Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Enmund v. Florida*, 458 U.S. 782, 798 (1982). Whether life without parole serves a legitimate purpose – and comports with the dignity of man – therefore rests at least in part on whether it serves a legitimate penological purpose. Juvenile life without parole sentences do not appropriately serve any of the purposes of punishment.

a. *Deterrence*

First, these sentences do not effectively deter other juveniles from committing similar crimes. In *Roper*, the Court noted that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper v. Simmons,* 543 U.S. 551, 571

(2005) (discussing psychological studies that demonstrate "the absence of evidence of deterrent effect" of the death penalty on would-be juvenile offenders); *See also Thompson* 487 U.S. at 837-38 (remarking that for children under age sixteen, "it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century"). Logic suggests that if the death penalty does not effectively deter young people, neither will a sentence of life without parole. *See, e.g., Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (holding that life without parole for a thirteen year old defendant was unconstitutional and questioning whether the sentence could even serve as a deterrent for other teenagers). Indeed, criminological studies questioning the deterrent effect of harsh adult criminal sanctions on juveniles further underscore this point: if the threat of some adult sentences fails to deter youth, the possible imposition of the relatively rare and extreme adult sentence of life without parole is unlikely to do so either. *See* Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future of Child. 81, 102-103 (2008), http://www.eric.ed.gov/ ERICDocs/ data/ericdocs2sql/content_storage_01/0000019b/80/41/ 92/20.pdf; David Lee and Justin McCrary, "*Crime, Punishment, and Myopia*," (Nat'l Bureau of Econ. Research, Working Paper No. W11491, 2005). *See*

also Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 *Crime & Delinq.* 96, 96-104 (1994), cited in Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 *Crime & Just.* 81 (2000); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence*, Juvenile & Family Court Journal (Summer 2004) (cited in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 199 (2008)).

b. Retribution

Life without parole sentences also fail to serve a legitimate retributive purpose. While retribution is served to some degree by any harsh sentence, that does not end the inquiry. Indeed, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). As the *Roper* Court stated about the culpability of youth: "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Thus, the *Roper* Court found that because offenders younger than eighteen are less culpable and more amenable to rehabilitation than those who are older, it is impossible to determine with any reasonable certainty that they are beyond redemption. *Id.*, at 568-75 (noting that differences between juveniles and adults "render suspect any conclusion that a

juvenile falls among the worst offenders. . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570). The *Roper* Court underscored that children should be treated differently because of their relative "lack of maturity," their susceptibility to outside pressures, and the still-developing nature of their personalities. *Roper*, 543 U.S. at 569 - 70.[6]

This conclusion, too, finds ample support in behavioral and neurobiological research. Adolescence has been characterized as a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment." *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000). Recent scholarship confirms that "[a]s a developmental stage, adolescence is a

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[6] On this issue, *Roper* follows a long line of cases recognizing juveniles' distinctive susceptibility to coercion and pressure. *See, e.g., In re Gault*, 387 U.S. 1, 39 (1967) (juveniles need the assistance of counsel to prevent coercion in the courtroom); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (holding the death penalty unconstitutional for juveniles under age 16 at the time of their crime because "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult"); *Lee v. Weissman*, 505 U.S. 577, 592 (1992) (holding school prayer unconstitutional and noting that "[a]s we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

complex mixture of the transitional and the formative," Scott & Steinberg, *Rethinking Juvenile Justice* 32, and that

> Because adolescents' executive functions are not mature, their capacities for planning, for anticipating future consequences, and for impulse control are deficient—as compared with those of adults—at a time when their inclination to engage in risk-taking behavior in the company of peers is greater than it will be in a few years."

Id. at 49.

Additionally, some studies have suggested that "adolescents' risk perception actually declines during mid-adolescence and then gradually increases into adulthood -- sixteen- and seventeen-year-old youths perceive fewer risks than do either younger or older research subjects." Barry Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 35-36 (2008).

The reasoning of *Roper* applies with equal force here – life without parole, termed by some as a "slow death," is an extraordinarily severe punishment. Elizabeth Cepparulo, Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death? 16 Temp. Pol. & Civ. Rts. L. Rev. 225, 239 (2006). Moreover, LWOP's finality allows no room to recognize a child's development and growth. When inflicted on youth with diminished culpability and heightened capacity to change, the sentence is too disproportionate to serve

its retributive aims within the bounds of the Eighth Amendment.

c. Incapacitation

As for incapacitation, although LWOP sentences do serve that purpose, such incapacitation is unreasonable and disproportionate where the offender no longer poses a danger to the community. *See United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) ("A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die"). This Court, in *Roper*, recognized that this may be particularly relevant to youth: "Indeed, 'the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" 543 U.S. at 570 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). The Court further emphasized that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 569-70 (internal citations omitted). Because "it is difficult even for expert psychologists to differentiate between" a crime reflecting immaturity and one reflecting "irreparable corruption," a sentence that makes no allowance for a child's future rehabilitation should not stand. *See id.* at 573-74. In *Graham v. Collins*, this Court similarly emphasized the role of future dangerousness in assessing the constitutionality of a sentence, noting that: "youthfulness may also be

seen as mitigating just because it is transitory, indicating that the defendant is less likely to be dangerous in the future." 506 U.S. 461, 518 (1993).

Sociological and psychological research supports this conclusion. *See* Steinberg & Schwartz, "*Developmental Psychology Goes to Court*," 23 (explaining that the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult); John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (documenting the criminal histories of 500 individuals who had been adjudicated delinquents and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and in many instances depended upon aspects of their adult lives). As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath*, 779 P.2d at 948.

d. Rehabilitation

Last, life without parole sentences do not promote rehabilitation for juveniles; they frustrate it. Like the death penalty, life without parole unconstitutionally fails to recognize a child's "potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 554. A mandatory sentence of life imprisonment without the

possibility of parole shares one important characteristic of a death sentence – the offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished "criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." *Furman*, 408 U.S. at 307 (Stewart, J., concurring). See also *Naovarath*, 779 P.2d at 944, 948-949 (describing the devastating effects of a life without parole sentence on a youth and holding the sentence unconstitutional as applied to a thirteen-year-old).

Again, research bears out the many ways in which lengthy adult sentences – especially life sentences – work against a youth's rehabilitation. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills for eventual release because there will be no release. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *See* Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 63-64 (2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives; *See also*, Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998) (discussing the "psychological toll" associated with LWOP, including citations to cases and sources suggesting that LWOP may be a fate worse than the death penalty).

Life without parole sentences are antithetical to the goal of rehabilitation. The "denial of hope,"

Naovarath, 779 P.2d at 944, is antithetical to the core values of human dignity that the Eighth Amendment was enacted to protect.

CONCLUSION

For the foregoing reasons, *Amici Curiae*, Juvenile Law Center, et al., respectfully request that this Court hold juvenile life without parole sentences unconstitutional in all cases, and reverse the Florida Court of Appeals' decisions in the present cases.

Respectfully Submitted,

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Dated: July 23, 2009

Sullivan v. Florida & *Graham v. Florida*

Identity of Amici and Statements of Interest

APPENDIX A

Organizations

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center (CFJC)** was established in

1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **National Juvenile Defender Center (NJDC)** was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a better capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

Alabama Fair Sentencing of Children is a grass roots effort in Alabama working to abolish juvenile life without parole. On May 6, 2009, a bill that would affect our children serving Life and Life Without Parole was introduced in the House of Representatives by Bobby Scot (D-VA) and John Conyers (D- MI). The name of the bill is HR 2289, the Juvenile Justice Accountability and Improvement Act of 2009. We are working with the coordinating efforts of the National for the Fair Sentencing of Children in Washington, DC to end life without parole, the death sentence in prison, by advocating the passage of this crucial legislation.

The Barton Child Law & Policy Clinic is a program of Emory Law School dedicated to ensuring safety, well-being and permanency for abused and court-involved children in Georgia. These outcomes are best achieved when systems only intervene in families when absolutely necessary, treat children and families fairly, provide the services and protections they are charged to provide, and are accountable to the public and the children they serve. The mission of the clinic is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting and nurturing these children, and to prepare child advocacy professionals.

The Barton Clinic was founded in March 2000. From summer 2001 – fall 2005, the Barton Clinic also housed the Southern Juvenile Defender Center, a regional support center for attorneys representing children accused of delinquent and status offenses. The Southern Juvenile Defender Center represented

children in juvenile courts in Georgia and provided technical assistance, training, and policy development assistance for seven southern states. In fall 2005 the Southern Juvenile Defender Center moved to the Southern Poverty Law Center. In summer 2006 the Barton Clinic added the Juvenile Defender Clinic to its existing public policy and legislative clinical offerings. Students in the Juvenile Defender Clinic provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring courts make decisions informed by the child's educational, mental health and family systems objectives.

Legal services provided by the Barton Clinic are provided at no cost to our clients.

The **Campaign for Youth Justice (CFYJ)** is a national organization created to provide a voice for youth prosecuted in the adult criminal system. The organization is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system; and is working to improve conditions within the juvenile justice system. CFYJ raises awareness of the negative impact of prosecuting youth in the adult criminal justice system and of incarcerating youth in adult jails and prisons and promotes researched-based, developmentally-appropriate rehabilitative programs and services for youth as an alternative. CFYJ also provides research, training and technical assistance to juvenile and criminal justice system stakeholders, policymakers, researchers, nonprofit organizations, and family members interested in addressing the

unique needs of youth prosecuted in the adult system.

The **Center for Children and Families (CCF)** at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Child Welfare Clinic and Gator TeamChild juvenile law clinic.

The **Center for Children's Advocacy (CCA)** is a non-profit organization based at the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure

that children's voices are heard and that children are afforded legal protections everywhere – community, foster placements, educational institutions, justice system and child welfare.

The Center for Children's Law and Policy (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Children's Law Center of Los Angeles (CLC) is a nonprofit, public interest law corporation created 18 years ago and funded by the Court to serve as appointed counsel for Los Angeles County's abused and neglected youth. Our 220 person staff of lawyers, paralegals and investigator/social workers serves as the "voice" in the foster care system for the vast majority of the nearly 24,000 children under the jurisdiction of the Los Angeles dependency court. Our committed attorneys and social work investigators are tireless advocates for these vulnerable youth, guiding them through the complicated and often overwhelming foster care system and accompanying court process. Appearing at every hearing, often with their young clients beside them in the courtroom, the child's attorney is the only person in the court speaking exclusively on

behalf of the child and going to bat for these children in ensuring that their needs are met.

Founded in 1977, the **Children's Law Center of Massachusetts (CLCM)** is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM attorneys regularly participate as faculty in MCLE and other continuing legal education seminars and serve as *amicus curiae* in juvenile justice and child welfare matters in Massachusetts courts. The CLCM is particularly concerned with fair treatment and outcomes for juveniles in delinquency proceedings and in adult court. This case presents questions of significance to the rights of all juveniles, but especially to the rights of juveniles as young as 14 in Massachusetts who face mandatory life without parole sentences in adult court.

The **Child Welfare League of America (CWLA)** is an 89-year-old association of more than 600 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to

interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. CWLA knows that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of its work, CWLA strives to ensure that every child and young person is protected from harm, injustice and discrimination and at all stages of the court process, juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in achieving these goals.

The ***Civitas* ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

The **Defender Association of Philadelphia** is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to

the ideal of high quality legal services for indigent criminal defendants. Today some two hundred and fifteen full time assistant defenders represent clients in adult and juvenile state and federal trial and appellate courts and at civil and criminal mental health hearings as well as state and county violation of probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly, Association attorneys represent juveniles charged with homicide. Life imprisonment without the possibility of parole is the only sentence for juveniles found guilty in adult court of either an intentional killing or a felony murder. The Defender Association attorneys have had numerous juveniles given sentences of life imprisonment without parole. The constitutionality of such sentences have been challenged at the trial level and at the appellate level by Defender Association lawyers.

Fight for Lifers, West is a Lifers Support Group in Western Pennsylvania devoted to Prisoners in Pennsylvania who are sentenced to Life Imprisonment Without Parole. In the years since Roper, FFLW has identified 453 Juvenile Lifers in the PADOC, revealing that Pennsylvania leads the world in this category. We have sent 21 newsletters, one every two months, to these 453 Juveniles lifers, helping to make these prisoners aware of each other and giving important information to them. In this way, they have shared information with each other, and made an impact on the outside world. FFLW has been seriously involved in the PA Senate Judiciary Committee Public Hearing on Juvenile Lifers, September 22, 2008, and in the United States House

Subcommittee on Crime and Terrorism and Homeland Security hearing on H.R. 2289- Juvenile Justice Accountability and Improvement Act of 2009, on June 9, 2009. We intend to be involved with the Supreme Court in its consideration of the two Florida cases, and welcome the opportunity to sign on with the Juvenile Law Center in its Amicus brief on behalf of two Florida children who have been sentenced to Life Without Parole.

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It has Special Consultative Status at the United Nations, regularly reports on human rights conditions in the United States and more than seventy other countries around the world, and actively promotes legislation and policies worldwide that advance protections of domestic and international human rights and humanitarian law. Human Rights Watch has investigated life without parole sentences for youth in the United States since 2004. Its reports on this subject include *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (a 2005 report on juveniles sentenced to life without parole throughout the United States); *Thrown Away* (a 2005 report on life without parole for juveniles in Colorado); and *When I Die They'll Send Me Home* (a 2008 report on life without parole for juveniles in California).

International CURE (Citizens United for rehabilitation of Errants) is a grassroots organization that started in San Antonio, Texas, in 1972. In 1974, it expanded to a statewide

organization and in 1985, it became a national group and moved its headquarters to Washington, DC. Since then, there have been nine national conventions and chapters exist in most states. As in Texas, most of these chapters are directed by people who have loved ones in prison and/or who have been incarcerated themselves. In 2005, CURE received consultative status from the United Nations and changed its name from "national" to "international". In June, 2009, International CURE had its 4th International Conference on Prison Reform and Human Rights in Geneva, Switzerland. The goals of CURE are twofold. (1) To use prisons only for those who absolutely have to be in them and (2) For those who have to be incarcerated, they should receive all the rehabilitative opportunities they need to "turn their lives around." CURE strongly feels that these goals will substantially reduce crime.

The **Iowa Coalition to Oppose Life without the Possibility of Parole for Children** is made up of groups of individuals and organizations who support the elimination of the sentence of life without the possibility of parole for children in the state of Iowa. The Coalition works to support legislation that will eliminate the sentence of life without the possibility of parole for children in the state of Iowa.

The **John Howard Association of Illinois** provides critical public oversight of Illinois' prisons, jails, and juvenile correctional facilities. As it has for more than a century, the Association promotes fair, humane, and effective sentencing and correctional policies, addresses inmate concerns, and provides

Illinois citizens and decision-makers with information needed to improve criminal and juvenile justice.

JustChildren, a project of the Legal Aid Justice Center, with offices in Charlottesville, Richmond, and Petersburg, is Virginia's largest children's law program. We work to reform Virginia's juvenile justice system in such areas as access to counsel, conditions of confinement, juvenile reentry, and juvenile transfer. JustChildren's goal is to keep more children in school, off the streets, and out of courts and prisons. In 2005, we helped to pass a law requiring counsel for youth at their initial detention hearings. We currently lead a statewide legislative campaign to reduce the number of youth who are tried and sentenced as adults. JustChildren also represents youth in juvenile prisons seeking access to more appropriate services and youth tried as adults, who have blended sentences of juvenile and adult time, to obtain reduction or elimination of the adult time. Working with these youth, many of whom have been convicted of serious felonies, we see how rehabilitation can transform a youth's behavior and attitude. Boys and girls involved in extensive dangerous behaviors have matured, turned their lives around, and persuaded Virginia judges that they no longer need to serve lengthy adult sentences.

The **Justice for Children Project** is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic

problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights in delinquency, status offense, abuse, neglect, and other legal proceedings affecting children's interests.

Juvenile Justice Project of Louisiana (JJPL) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and indentify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, post-disposition and appeal, and that the juvenile and adult criminal justice systems take into account the unique developmental differences between youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing

support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The **Juvenile Rights Advocacy Project (JRAP)** is curricular law clinic, based at Boston College Law School since 1995. JRAP represents youth, with a focus on girls, who are in the delinquency or status offense systems, across systems and until the youth reach majority. JRAP attorneys use legal system to access social services and community supports for youth, hold systems accountable, and reduce the use of incarceration. JRAP also conducts research and policy advocacy for youth in the justice system. Among its work, JRAP seeks to develop and model programs for delinquent girls that reduce the use of incarceration and detention, and prompt systems to work collaboratively to shore up community resources supporting youth.

The **Kids First Law Center** is a nonprofit public interest organization for children in Cedar Rapids, Iowa. Kids First opened in January 2005 and provides free legal counsel to children in high-conflict custody and divorce cases. Kids First focuses on the needs and rights of children placed in the middle of conflict. The organization strives to make children's voices heard in the court system. We believe judges and attorneys should seek to understand situations from the child's perspective. Because of their developmental stages and comprehension abilities, children should be treated differently than adults in the court system.

The **Mid-Atlantic Juvenile Defender Center (MAJDC)** is one of nine regional centers created by the National Juvenile Defender Center in 2000. MAJDC is a multi-faceted juvenile defense resource center serving the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes policy development in the region through conducting state based assessments of access to counsel and quality of representation in delinquency proceedings. MAJDC also coordinates training programs for defenders, provides technical assistance and encourages the development of oversight and accountability in the justice system.

The **National Association of Counsel for Children (NACC)** is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal services to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resources center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs involving

the legal interest of children in state and federal appellate courts and the Supreme Court of the United States.

Founded in 1977, the **National Association of Counsel for Children (NACC)** is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. *Amicus* cases must past staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 2000 members representing all 50 states and the

District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The **National Center for Youth Law (NCYL)** is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, *Youth Law News*, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. NCYL also works to protect the rights of children in juvenile and adult criminal justice systems, at all stages of the proceedings, and to ensure that they are treated fairly consistent with their age and stage of development.

The mission of the **National Juvenile Justice Network (NJJN)** is to enhance the capacity of state-based juvenile justice coalitions and organizations to advocate for state and federal laws,

policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty members in thirty-three states all of which seek to establish effective and appropriate juvenile justice systems. NJJN holds that youth are developmentally different from adults and a result should not be transferred into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole.

The **Northeast Regional Juvenile Defender Center (NRJDC)** is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NRJDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Pacific Juvenile Defender Center** is a regional affiliate of the National Juvenile Defender Center. Members of the Center include juvenile trial lawyers, appellate counsel, law school clinical staff, attorneys and advocates from nonprofit law centers working to protect the rights of children in juvenile

delinquency proceedings in California and Hawaii. The Center engages in appellate advocacy, public policy and legislative discussions with respect to the treatment of children in the juvenile and criminal justice systems. Center members have extensive experience with cases involving serious juvenile crime, the impact of adolescent development on criminality, and the differences between the juvenile and adult criminal justice systems. These cases, involving the imposition of Life Without the Possibility of Parole on juvenile offenders, present questions that are at the core of the Pacific Juvenile Defender Center's work.

The **Pendulum Foundation** is a non-profit organization committed to educating the public about the issues surrounding children convicted as adults. The goal of the Foundation is to ensure – whether inside or outside of prison – happy, healthy, well-adjusted and productive adults. Located in Colorado, the Pendulum Foundation serves kids who are serving life in prison. The Foundation is committed to educating the public about the issues surrounding children convicted and sentenced as adults. We are also committed to taking into prison MRT, a groundbreaking cognitive behavior program, which will help transform the lives of young prisoners. Scientific research has decreed that children are indeed different than adults. The justice system agrees – by sentencing many of these kids to harsher sentences than their adult counterparts. The children who've received life sentences in Colorado are not the worst of the worst. We have a youth who is serving life for a hit and run. Two others who killed their abusers after all social service agencies,

law enforcement and professionals failed to help. Many of our kids never killed anybody. Twenty years ago these young lifers would have received treatment, time in a youth facility and would now be productive, taxpaying members of society. The Pendulum Foundation has been instrumental in ending JLWOP in Colorado and in creating the first juvenile clemency board in the nation, but those are tiny steps and will have no effect on those who will die behind bars. Visit these prisons. Talk to these kids – now men. You'll see for yourself that life without parole for a child is indeed cruel and unusual punishment.

The **Pennsylvania Prison Society** is strongly moved to join JLC and other organizations in addressing the issue of sentencing juvenile offenders to life without possibility of parole. Since its founding more than two centuries ago, the Prison Society has advocated for a humane system of corrections: one that recognizes the inherent ability of men and women to change their attitudes and behavior. No group exemplifies better the concept of rehabilitation than juvenile offenders. We see the condemnation of juveniles to life without parole as an unwarranted abdication of faith in humanity -- a terminal sentence that offends our sense of humane treatment, violates the spirit of the Supreme Court with respect to its ruling relating to death sentences for juveniles, and flies in the face of neurological findings on brain development and criminal culpability. The Prison Society has a long-term positive working relationship with life-sentenced inmates across the Commonwealth and particularly those arrested when they were juveniles. For the

past twelve years, the Prison Society has been involved in litigation regarding the Board of Pardons, which impacts lifers seeking commutation—the only avenue available to them now for release from prison. Most recently, the agency has been working with members of the General Assembly to craft legislation to study the issue of juveniles with life sentences in Pennsylvania as well as pursuing parole options.

The **Public Defender Service for the District of Columbia (PDS)** is a federally funded, independent public defender organization; for almost 40 years, PDS has provided quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia justice system. PDS provides legal representation to many of the indigent children in the most serious delinquency cases, including those who have special education needs due to learning disabilities. PDS also represents classes of youth, including a class consisting of children committed to the custody of the District of Columbia.

The **Southern Juvenile Defender Center (SJDC)** works to ensure excellence in juvenile defense and secure justice for children in delinquency and criminal proceedings in the southeastern United States. SJDC provides training and resources to juvenile defenders, and advocates for systemic reforms designed to give children the greatest opportunities to grow and thrive. Through public education and advocacy, SJDC encourages attorneys and judges to rely upon scientific research

concerning adolescent brain development in cases involving youthful defendants. SJDC is based at the **Southern Poverty Law Center (SPLC)** in Montgomery, Alabama. Founded in 1971, SPLC has litigated numerous civil rights cases on behalf of incarcerated children and other vulnerable populations.

The **Support Center for Child Advocates** (*Child Advocates*) is Philadelphia's volunteer lawyer program for abused and neglected children in Philadelphia, representing 800 children each year. For all the children committed to *Child Advocates* care, lawyers and social workers advocate to ensure safety, health, education, family, permanency and access to justice. Respected for diligent and effective advocacy, *Child Advocates* moves both public systems to deliver entitled services and private systems to open their doors to needy children and their families. We know that child victims, especially poor children and including many whom we have represented, may act out criminally in response to their victimization, poverty, family background and their own developmental deficits.

Voices for Georgia's Children is an independent, non-profit organization whose mission is to substantially improve outcomes for Georgia's children by engaging lawmakers and the public into building a sustained, comprehensive, long-term agenda to impact the lives of our kids in five distinct areas: health, safety, education, connectedness and employability. Through advocacy, original research and analysis, Voices assists leaders and citizens of Georgia in making sound decisions on policy,

investment and systems that serve children and youth.

The **Youth Law Center** is a San Francisco-based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles as adults. Center attorneys were consultants in the John D. and Catherine T. MacArthur Foundation project on adolescent development, and have recently authored a law review article on juvenile competence to stand trial. These cases, challenging the imposition of Life Without the Possibility of Parole on a 13 year-old and a 17 year-old, for crimes not resulting in death, fit squarely with in the Center's long-term interest and expertise.

Individuals

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Shay Bilchik is the founder and Director of the Center for Juvenile Justice Reform at Georgetown University Public Policy Institute. The Center's purpose is to focus the nation public agency

leaders, across systems of care and levels of government, on the key components of a strong juvenile justice reform agenda. This work is carried out through the dissemination of papers on key topics, the sponsorship of symposia, and a Certificate Program at Georgetown providing public agency leaders with opportunities for short, but intensive, periods of study. Prior to joining the Institute on March 1, 2007, Mr. Bilchik was the President and CEO of the Child Welfare League of America, a position he held from February of 2000. Shay led CWLA in its advocacy on behalf of children through his public speaking, testimony and published articles, as well as collaborative work with other organizations. He worked closely with the CWLA Board of Directors, staff, and its public and private agency members on issues impacting the well-being of children and families. In 2001, 2004, 2005 and 2006, he was named among The NonProfit Times Power and Influence Top 50 for making his mark in the public policy arena and championing child welfare issues. Prior to his tenure at CWLA, Shay headed up the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the U.S. Department of Justice, where he advocated for and supported a balanced and multi-systems approach to attacking juvenile crime. Before coming to the nation's capital, Mr. Bilchik was an Assistant State Attorney in Miami, Florida from 1977-1993, where he served as a trial lawyer, juvenile division chief, and Chief Assistant State Attorney. Mr. Bilchik earned his B.S. and J.D. degrees from the University of Florida. As a former prosecutor and U.S. Department of Justice official in charge of juvenile justice and delinquency prevention issues he has

learned that overly punitive sentencing policies do not work to either make our communities safe or rehabilitate offenders. In fact, research on juvenile offending, sentencing of juveniles as adult offenders, and adolescent brain development teach us that these disproportionate responses actually exacerbate juvenile offending patterns. JLWOP is a prime example of this simplistic thinking and ineffective public policy - a policy that is not shared by any developed country in the world.

Tamar Birckhead is an Assistant Professor of Law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the Criminal Lawyering Process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Professor Birckhead's 2008 article on raising the age of juvenile court jurisdiction from 16 to 18 in North Carolina has received significant attention at both the state and national levels. The Raleigh *News & Observer* published an Op-Ed written by Professor Birckhead on the subject of raising the age, and she has been interviewed by radio and print reporters across the state on her findings. She has testified before the N.C. Governor's Crime Commission on the history of raising the age of juvenile court jurisdiction, and Action for Children North Carolina, the state's premier child advocacy organization, issued a press release and fact sheet on her research. In addition, The Campaign for Youth Justice, a national organization dedicated to ending the practice of trying, sentencing, and incarcerating youth under 18 in the adult criminal justice system, highlighted

Professor Birckhead's research in their newsletter and interviewed her for their weekly radio program, Juvenile Justice Matters. Prior to joining the UNC School of Law faculty in 2004, Professor Birckhead practiced for ten years as a public defender, representing indigent criminal defendants -- including juveniles -- in the Massachusetts trial and appellate courts as a staff attorney with the Committee for Public Counsel Services and in federal district court in Boston as an Assistant Federal Public Defender. Professor Birckhead has defended clients in a wide variety of criminal cases, from violent felony offenses in state court to acts of terrorism in federal court. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the U.S. as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is Vice President of the Board for the North Carolina Center on Actual Innocence and has been appointed to the Executive Council of the Juvenile Justice and Children's Rights Section of the North Carolina Bar Association. She is also a member of the Advisory Board for the North Carolina Juvenile Defender as well as a member of the Criminal Defense Section and the Juvenile Defender Section of the North Carolina Academy of Trial Lawyers. Professor Birckhead received her B.A. degree in English Literature with Honors from Yale University and her J.D. with Honors from Harvard Law School, where she served as Recent Developments Editor of The Harvard Women's Law Journal.

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Michele Deitch, J.D., M.Sc., teaches juvenile justice policy and criminal justice policy at the University of Texas--Lyndon B. Johnson School of Public Affairs and at the University of Texas School of Law. She is the lead author of *From Time Out to Hard Time: Young Children in the Adult Criminal*

Justice System (LBJ School of Public Affairs, 2009). She served as part of the legal team that represented Christopher Pittman in his petition of certiorari to the United State Supreme Court in 2008 (*Pittman v. South Carolina*), challenging the constitutionality of a mandatory 30-year sentence without possibility of parole imposed on a 12-year old child. Professor Deitch has served on a Blue Ribbon Task Force charged with proposing reforms to the Texas juvenile justice system, and she has been a federal court appointed monitor of conditions in the Texas adult prison system. She also served as the drafter of the American Bar Association's proposed standards on the legal treatment of prisoners.

Barbara Fedders is a clinical assistant professor at the University of North Carolina School of Law. Prior to joining the UNC faculty in January 2008, Professor Fedders was a clinical instructor at the Harvard Law School Criminal Justice Institute for four years. Prior to that, she worked for the Massachusetts Committee for Public Counsel Services as a Soros Justice Fellow and staff attorney. She began her career in clinical work at the Juvenile Rights Advocacy Project at Boston College Law School. As a law student, Professor Fedders was a Root-Tilden-Snow scholar and co-founded the NYU Prisoners' Rights and Education Project. She is a member of the advisory boards of the Prison Policy Initiative and the Equity Project.

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Brian J. Foley is a Visiting Associate Professor of Law at Boston University School of Law. He teaches and writes in the area of criminal law and procedure. *See, e.g.*, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MARYLAND L. REV. __ (2010) (forthcoming); *Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science With Storytelling*, 43 TULSA L. REV. 397 (2007) (invited - symposium on forensic scientific evidence and actual innocence); *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009 (2007). Professor Foley co-authored a 50-state survey of law concerning juvenile life without parole that was

published as an Appendix to Connie de la Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F L. REV. 984 (2008). He has done pro bono work against juvenile life without parole sentences, co-authoring the following party brief and amicus briefs: *Brief for Appellant*, in Commonwealth of Pennsylvania vs. Edward Batzig, Superior Court of Pennsylvania Sitting in Philadelphia, EDA 2005, No. 1711 (with Defender Association of Philadelphia, the Juvenile Law Center, and the Center for Law and Global Justice, University of San Francisco School of Law), May, 2008; *Brief of Amicus Curiae Defender Association of Philadelphia and Juvenile Law Center on Behalf of Aaron Phillips,* in Commonwealth of Pennsylvania v. Aaron Phillips, Pennsylvania Superior Court, Eastern District, EDA 2005, No. 2729 (with Defender Association of Philadelphia and Juvenile Law Center); *Brief of Amicus Curiae Defender Association of Philadelphia and Juvenile Law Center on Behalf of John Pace,* in Commonwealth of Pennsylvania v. John Pace, Pennsylvania Superior Court, Eastern District, EDA 2006, No. 921.

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AMICUS CURIAE BRIEF

(25) (24)

Nos. 08-7412, 08-7621

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs of Certiorari to the Florida First District Court of Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF STATE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. OUTSIDE THE DEATH-PENALTY CONTEXT, THE EIGHTH AMENDMENT STRONGLY DEFERS TO STATE SENTENCING JUDGMENT 4

II. IN THE VAST MAJORITY OF STATES, VIOLENT JUVENILES MAY BE TRIED AS ADULTS AND SENTENCED TO LIFE-WITHOUT-PAROLE. 8

A. Legislation in Forty-Five States Allows Life-Without-Parole for Violent Juvenile Offenders. 10

(1). Seven States allow the sentence for homicide crimes only. 10

(2). Thirty-eight States also allow the sentence for non-homicide crimes. 13

(3). Only four States specifically disallow life-without-parole, while still allowing lengthy mandatory terms. 22

(4). Both the District of Columbia and the federal government allow juvenile life-without-parole for non-homicide crimes. 24

B. Evolving Transfer Provisions Show that States Have Consciously Toughened Juvenile Sentencing. 25

III. STATE LEGISLATURES ARE BEST SITUATED TO SET JUVENILE SENTENCING POLICIES. 29

A. Officials Who Calibrate Juvenile Sentencing Must Remain Directly Accountable to Their Citizens. 30

B. States Have Crafted Juvenile Sentencing Policies that Wisely Balance Justice with Mercy. 33

CONCLUSION 38

TABLE OF AUTHORITIES

Federal Cases

Ewing v. California, 538 U.S. 11 (2003)..... 4, 6, 8, 10

Harmelin v. Michigan, 501 U.S. 957 (1991) ....passim

Harris v. Wright, 93 F.3d 581 (9th Cir. 1996) 6

Roper v. Simmons, 543 U.S. 551 (2005).....passim

Rummel v. Estelle, 445 U.S. 263 (1980) 4, 5, 6, 7

Solem v. Helm, 463 U.S. 277 (1983).....passim

United States v. Christian, 63 M.J. 205 (2006) 25

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 5

State Cases

Shepherd v. Commonwealth, 251 S.W.3d 309 (Ky. 2008) 23

State v. Rauch, 13 P.3d 324 (Haw. 2000)..... 26

Federal Statutes

10 U.S.C. § 505(a) 25

10 U.S.C. § 856a..... 25

10 U.S.C. § 918..... 25

10 U.S.C. § 920..... 25

18 U.S.C. § 1111..... 24

18 U.S.C. § 1113..... 24

18 U.S.C. § 113..... 24

18 U.S.C. § 2111..... 24

18 U.S.C. § 2113..... 24

18 U.S.C. § 2241 24

18 U.S.C. § 3559 25

18 U.S.C. § 5032 24

D.C. CODE ANN. § 16-2305 24

D.C. CODE ANN. § 22-1804a(a)(2) 24

D.C. CODE ANN. § 22-2104 24

D.C. CODE ANN. § 22-2106 24

D.C. CODE ANN. § 22-3020(a) 24

D.C. CODE ANN. § 22-3153(a) 24

JUVENILE JUSTICE ACCOUNTABILITY AND IMPROVEMENT ACT OF 2009, H.R. 2289, 111th Cong. 25

State Statutes

18 PA. CONS. STAT. § 3121(e)(2) 20

2006 COLO. LEGIS. SERV. Ch. 228 34

2009 N.M. Laws, ch. 11, Sec. 1 12

2009 TEX. SESS. LAW SERV. Ch. 765 ..... 23, 34

42 PA. CONS. STAT. § 6302 20

42 PA. CONS. STAT. § 9714(a)(2) 20

42 PA. CONS. STAT. §§ 6355(a) 20

61 PA. CONS. STAT. § 331.21(a) 20

705 ILL. COMP. STAT. 405/5-805 15

730 ILL. COMP. STAT. 5/5-8-1 15

74 DEL. LAWS c. 106, §§ 28, 33 35

ALA. CODE § 12-15-203 13

ALA. CODE § 13A-5-9(c) 13
ALA. CODE § 13A-6-61 13
ALA. CODE § 13A-7-5 13
ALASKA STAT. § 12-55-015(g) 23
ALASKA STAT. § 41.12.030(a) 35
ARIZ. REV. STAT. § 13-1423 13
ARIZ. REV. STAT. § 13-501 13
ARK. CODE ANN. § 5-4-501(c) 14
ARK. CODE ANN. § 9-27-318 13
CAL. PENAL CODE § 1170.17 14
CAL. PENAL CODE § 667.7 14
COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) 23, 34
CONN. GEN. STAT. ANN. § 46b-127 10
CONN. GEN. STAT. ANN. § 53A-35A 10
DEL. CODE ANN. tit. 10, § 1010(a)(1) 14
DEL. CODE ANN. tit. 10, § 921(2)(a) 14
DEL. CODE ANN. tit. 11, § 4205 14
DEL. CODE ANN. tit. 11, § 531 14
DEL. CODE ANN. tit. 11, § 636 14
DEL. CODE ANN. tit. 11, § 773 14
FLA. STAT. ANN. § 794.011(3) 14
FLA. STAT. ANN. § 810.02(2) 14
FLA. STAT. ANN. § 985.56 14
GA. CODE ANN. § 15-11.30.2(4) 14

GA. CODE ANN. § 16-6-1(b) 14
GA. CODE ANN. § 17-10-7(b)(2) 14
H.B. 4518, 4594-95; S.B. 173-176, 1999 Leg., 95th Sess. (Mich. 2009) 35
HAW. REV. STAT. ANN. § 571-22(d) 11
HAW. REV. STAT. ANN. § 706-656(1) 11
HAW. REV. STAT. ANN. § 706-656(2) 11
HAW. REV. STAT. ANN. § 706-657 11
IDAHO CODE § 18-6104 15
IDAHO CODE § 18-6503 15
IDAHO CODE § 20-508 15
IDAHO CODE § 20-509 15
IND. CODE § 31-30-3-6(1) 15
IND. CODE § 35-50-2-8.5(a) 15
IOWA CODE § 232.45(6) 15
IOWA CODE § 709.2 15
IOWA CODE § 710.2 15
IOWA CODE § 902.1 15
KAN. STAT. ANN. § 21-4622 23
KAN. STAT. ANN. 21-4635(b) 23
KY. REV. STAT. ANN. § 640.040(1) 23
LA. CHILD. CODE art. 305 15
LA. CHILD. CODE art. 857(A) 15
LA. CHILD. CODE art. 857(B) 16
LA. REV. STAT. ANN. § 14:42(D)(1) 15

LA. REV. STAT. ANN. § 14:44 15
MASS. GEN. LAWS ANN. ch. 119 § 74 11
MASS. GEN. LAWS. ANN. ch. 265 § 2 11
MD. CODE ANN., CRIM. LAW § 3-303(d)(2) 16
MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03(d)(1) 16
MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06(a)(2) 16
ME. REV. STAT. ANN. tit. 15 § 3101(4) 11
ME. REV. STAT. ANN. tit. 17-a § 1251 11
MICH. COMP. LAWS § 333.7413(1) 16
MICH. COMP. LAWS § 712A.4 16
MICH. COMP. LAWS § 750.349(3) 16
MICH. COMP. LAWS § 750.529 16
MICH. COMP. LAWS § 764.27 16
MICH. COMP. LAWS § 769.1 16
MINN. STAT. § 260B.125(1) 16
MINN. STAT. § 609.055 16
MINN. STAT. § 609.3455(2) 16
MISS. CODE ANN. § 47-7-3(1)(a) 16
MISS. CODE ANN. § 43-21-157 16
MISS. CODE ANN. § 99-18-83 16
MISS. CODE ANN. § 99-19-81 16
MO. REV. STAT. § 195.214 17
MO. REV. STAT. § 195.218 17

MO. REV. STAT. § 195.222 17
MO. REV. STAT. § 195.223 17
MO. REV. STAT. § 211.071(1) 17
MO. REV. STAT. § 558.018 17
MONT. CODE ANN. § 41-5-206(1) 17
MONT. CODE ANN. § 41-5-2503(1)(a) 17
MONT. CODE ANN. § 45-5-303 17
MONT. CODE ANN. § 45-5-503 17
MONT. CODE ANN. § 46-18-202(2) 17
MONT. CODE ANN. § 46-18-219(1)(a)(i) 17
MONT. CODE ANN. § 46-18-220 17
MONT. CODE ANN. § 46-18-222(1) 17
N.C. GEN. STAT. § 14-7.12 19
N.C. GEN. STAT. § 15A-1340.16B(a) 19
N.C. GEN. STAT. § 15A-1340.16C 19
N.C. GEN. STAT. § 7B-2200 19
N.D. CENT. CODE § 12.1-04-01 19
N.D. CENT. CODE § 12.1-20-03 19
N.D. CENT. CODE § 12.1-32-01(1) 19
N.D. CENT. CODE § 27-20-34 19
N.H. REV. STAT. ANN. § 169-B:24(II) 19
N.H. REV. STAT. ANN. § 628:1(II) 19
N.H. REV. STAT. ANN. § 651.6(III)(e) 19
N J. STAT. ANN. § 2A:4A-26 11

N.J. STAT. ANN. § 2C:11-3 11
N.M. STAT. § 31-18-14 12
N.M. STAT. § 31-18-15.2(A) 12
N.M. STAT. § 31-18-15.3(D) 12
N.Y. PENAL CODE § 30.00(2) 18
N.Y. PENAL CODE § 70.00(5) 18
N.Y. PENAL LAW § 135.25 18
N.Y. PENAL LAW § 30.00(1) 18
N.Y. PENAL LAW § 490.25(d) 18
NEB. REV. STAT. § 28-105 17
NEB. REV. STAT. § 28-303 17
NEB. REV. STAT. § 28-304 17
NEB. REV. STAT. § 28-313(2) 17
NEB. REV. STAT. § 28-319.01 17
NEB. REV. STAT. § 29-2204 17
NEB. REV. STAT. § 43-247 17
NEB. REV. STAT. § 43-276 17
NEV. REV. STAT. § 200.366 18
NEV. REV. STAT. § 200.400(4) 18
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NEV. REV. STAT. § 207.012 18
NEV. REV. STAT. § 62B.330 18
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NEV. SENATE BILL No. 235, § 2 35

OHIO REV. CODE ANN. § 2152.10(B) 19
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OHIO REV. CODE ANN. § 2907.02 19
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OKLA. STAT. tit. 21, § 51.1a 20
OR. REV. STAT. ANN. § 137.707(1) 20
OR. REV. STAT. ANN. § 137.719(1) 20
OR. REV. STAT. ANN. § 161.620 20
OR. REV. STAT. ANN. § 163.150(3) 20
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R.I. GEN. LAWS § 14-1-7 20
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S.C. CODE ANN. § 63-19-1210 20
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S.D. CODIFIED LAWS § 22-19-1 21
S.D. CODIFIED LAWS § 22-22-1 21
S.D. CODIFIED LAWS § 22-3-1 21
S.D. CODIFIED LAWS § 22-6-1 21
S.D. CODIFIED LAWS § 26-11-3.1 21

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TENN. CODE ANN. § 40-35-120(g) 21
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TEX. PENAL CODE § 12.31 ..... 23, 34
UTAH CODE ANN. § 76-2-301 21
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VA. CODE ANN. § 53.1-151(B1) 21
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W. VA. CODE § 49-5-10 22
W. VA. CODE § 61-2-14a(a) 22
WASH. REV. CODE § 13.40.110 22
WASH. REV. CODE § 9.94A.570 22
WASH. REV. CODE. § 9A.04.050 22
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YOUTH ACCOUNTABILITY ACT (H.B. 1414) 34

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JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 30

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INTEREST OF STATE *AMICI*

Juvenile violence in the United States has increased dramatically over the past half-century. The State *amici* have, and have always had, primary responsibility for meeting this daunting problem. As the United States Department of Justice observed over a decade ago:

> States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.[1]

But States also have the regrettable duty of punishing, remedying, and preventing the terrible crimes that some juveniles commit. Such crimes are presented in these cases: the beating and brutal rape of a 72-year-old woman by the 13-year-old Sullivan, and the violent armed robberies perpetrated by the 16-year-old Graham.[2]

Ninety percent of the States have retained life-without-parole as an available sentence for certain violent juvenile offenders. Thankfully, only rare cases warrant that severe sanction, and the States

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[1] Patricia Torbet *et al.*, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME iii (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) ("O.J.J.D.P. REPORT").

[2] *See* Brief of Respondent at 4-5, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6-9, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009).

themselves vary on when it may be imposed on juveniles. The State *amici* have an overarching interest in retaining the discretion to calibrate juvenile sentences. Only if left free to do that can the States continue to respond to the evolving challenge of juvenile violence.

SUMMARY OF ARGUMENT

No one wants to believe that young people can commit horrible crimes. But sometimes they do. And no one wants to consider whether they should serve lengthy prison terms. But States must consider it, since they are responsible to their own citizens for protecting them, for deterring crime, for assuaging the victims, and for punishing the guilty. Consequently, as Part I explains, the Eighth Amendment leaves States considerable latitude in deciding how to sentence violent juvenile offenders.

It is a rare and agonizing decision to sentence a juvenile to life-without-parole. But rare does not mean unconstitutional. Rather, rarity is an index of mercy—of reluctance to take this severe step. And yet, as Part II describes, States have overwhelmingly made the reasoned legislative choice that certain crimes—such as rape, robbery and kidnapping—are so morally reprehensible, so damaging to victims, and so undermine a community's sense of security, that the law's second-most severe sentence should be available, even if the offender is a juvenile. The District of Columbia and the federal government have done so as well. And even the few States that expressly disallow juvenile life-without-parole sentences

would nonetheless permit lengthy mandatory sentences of up to 50 years.

Finally, as Part III explains, politically-accountable state legislatures are the ones that should weigh such painful choices, and they have done so vigilantly. The best example is the kaleidoscope of state transfer and waiver provisions through which juveniles may become subject to adult penalties. Through those mechanisms, States have grappled profoundly with every facet of juvenile violence—such as an offender's age, maturity, psycho-social development, criminal background, and potential for rehabilitation. States thus expose juveniles to a possible life-without-parole sentence only in carefully considered circumstances in which deterrence and punishment outweigh rehabilitation.

Far from condemning such a choice, this Court has tacitly approved it. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court reasoned that States had deterrence options for violent juveniles other than the death penalty. The Court deemed it "worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.*, at 572. The Court should not now interpret the Eighth Amendment to remove the States' power to impose this sanction on violent juvenile criminals such as the Petitioners.

ARGUMENT

I. OUTSIDE THE DEATH-PENALTY CONTEXT, THE EIGHTH AMENDMENT STRONGLY DEFERS TO STATE SENTENCING JUDGMENT.

How severe should criminal sentences be? Should the guilty be eligible for parole? If so, when? Should sentencing aim primarily to reform, punish or deter? It is "properly within the province of legislatures, not courts" to ponder these questions. *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)).[3] This Court "do[es] not sit as a 'superlegislature' to second-guess" the hard sentencing choices that fall to state legislatures. *Ewing v. California*, 538 U.S. 11, 29 (2003) (op. of O'Connor, J.). And squarely within their responsibilities is the agonizing subject presented in these cases: how severely to sentence violent juvenile offenders.

The Court's death-penalty cases have little to say about the issue. Life-without-parole "cannot be compared with death." *Harmelin*, 501 U.S., at 996 (op. of Court). As Justice Stewart once observed, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North*

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[3] *See also Solem v. Helm*, 463 U.S. 277, 290 (1983) (explaining that the Eighth Amendment affords "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes").

Carolina, 428 U.S. 280, 305 (1976) (op. of Stewart, J.). The Court has refused to extend death-penalty analysis to life-without-parole sentences.[4] Cases such as *Roper*, *supra*, then, provide marginal assistance in gauging juvenile prison terms, "[b]ecause a sentence of death differs in kind from *any* sentence of imprisonment, *no matter how long*." *Rummel*, 445 U.S., at 272 (emphasis added).[5]

Every State carefully considers juveniles' age, maturity, and background before trying them as adults. *See infra* Part II.A. But the Eighth Amendment does not directly regulate state discretion over such matters. *See, e.g., Harmelin*, 501 U.S., at 994-95 (op. of Court) (holding that Eighth Amendment does not require consideration of mitigating factors in non-capital sentencing). At most, juvenile non-capital sentences must satisfy a narrow proportionality principle that "forbids only extreme sentences ... 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S., at 997, 1001 (Kennedy, J., concurring) (and collecting cases); *see*

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[4] *See Harmelin*, 501 U.S., at 996 (op. of Court) (rejecting argument that, simply because life-without-parole is "the second most severe known to the law," it should be constitutionally equated with death); *Roper*, 543 U.S., at 568 (explaining that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it *with special force*") (emphasis added).

[5] *See also Solem*, 463 U.S., at 295 (explaining "the death penalty is different from other punishments in kind rather than degree"); *Rummel*, 445 U.S., at 272 (observing that "[t]his theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions") (collecting cases).

also Ewing, 538 U.S., at 21 (op. of O'Connor, J.). Such review is ill-adapted for drawing lines at particular sentence lengths, ages, or stages of psycho-social development.[6]

Gross proportionality implicitly allows the different States to adopt a variety of approaches to juvenile sentencing. Comparing juvenile sentences across state lines may provide some limited analytical guidance[7]—here, for instance, it underscores the widespread availability of life-without-parole for violent juvenile crime, and hence the relative *proportionality* of the sentence. *See infra* Part II.A. But even if one State imposes,

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[6] *See, e.g., Harmelin*, 501 U.S., at 1000-01 (Kennedy, J., concurring) (reasoning that the Court's "decisions recognize that [it] lack[s] clear objective standards to distinguish between sentences for different terms of years"); *see also Rummel*, 445 U.S., at 1139-40 (observing that the relatively "bright lines" between different *types* of punishments are "considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years"); *see also Harris v. Wright*, 93 F.3d 581, 584 (9th Cir. 1996) (explaining that "capital punishment aside, there's no constitutional (or rational) basis for classifying punishment in distinct, ordinal categories").

[7] *See, e.g., Harmelin*, 501 U.S., at 1005 (Kennedy J., concurring) (noting that inter- and intra-state comparisons are "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality"); *see also id.*, at 999-1000 (explaining that "[s]tate sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise"); *Ewing*, 538 U.S., at 23 (op. of O'Connor, J.) (agreeing that proportionality "d[oes] not mandate comparative analysis") (quotations omitted).

nationally, the most stringent juvenile sentences, that alone does not render them grossly disproportionate for Eighth Amendment purposes.[8]

This restrained review affords States wide latitude in deciding how severely to punish violent juvenile crime in particular. The Court has emphasized that, for Eighth Amendment purposes, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem*, 463 U.S., at 292-93.[9] Thus States may decide that direct violent assaults against persons—even by juveniles—merit especially severe penalties.[10] And offenses may be deemed serious even if they are merely related to other violent crime.[11] In sum, States may "with reason conclude that the threat posed to the individual and society by" violent

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[8] *See, e.g., Rummel*, 445 U.S., at 281 (explaining that "[e]ven were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States").

[9] *See also Harmelin*, 501 U.S., at 1002 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 296) (reasoning that issuing a bad check—"one of the most passive felonies a person could commit"—is relatively non-serious, given it "involve[s] neither violence nor threat of violence").

[10] *See, e.g., Solem*, 463 U.S., at 297 (observing that prior three-strike felonies "were nonviolent and none was a crime against a person").

[11] *See, e.g., Harmelin*, 501 U.S., at 1002-03 (Kennedy, J., concurring) (deeming cocaine possession violent for Eighth Amendment purposes given a "direct nexus between illegal drugs and crimes of violence").

crimes "is momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Harmelin*, 501 U.S., at 1003 (Kennedy, J., concurring).

When States calibrate juvenile sentences they make "a normative judgment about deserved punishment [that] rests on a moral foundation, not a scientific one." Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 72 (2007) ("Feld"). It is thus a task lying at the core of politically-accountable state sovereignty. This Court has a "longstanding [...] tradition of deferring to state legislatures in making and implementing such important policy decisions." *Ewing*, 538 U.S., at 24 (op. of O'Connor, J.) (collecting cases).

II. IN THE VAST MAJORITY OF STATES, VIOLENT JUVENILES MAY BE TRIED AS ADULTS AND SENTENCED TO LIFE-WITHOUT-PAROLE.

The sentencing landscape over the last half-century shows that a super-majority of States have decided that life-without-parole should remain available for violent juvenile criminals. Such sentences are rare, of course, and should be. But 90% of the States have deliberately retained this severe measure for dealing with juvenile violence.

Petitioners in both cases have framed their arguments solely in terms of *Roper*'s death-penalty

analysis.[12] But, as Part I *supra* explains, that is the wrong test for non-capital juvenile sentences. In that context, the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S., at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 288). Consequently, the following survey of sentencing policies and trends will serve double duty.

First, it will demonstrate that, even under the stricter standards Petitioners have incorrectly adopted, there is no "objective indicia of consensus" that life-without-parole is disproportionate for violent juvenile offenders. *See Roper*, 543 U.S., at 564. To the contrary, any objective measure based on legislative enactments points overwhelmingly in the opposite direction. Second, and more to the point, the data will demonstrate that such sentences are not grossly disproportionate to violent crimes committed by juveniles generally—and certainly not to the beating and brutal rape of a 72-year-old woman perpetrated by Sullivan, nor to the violent armed robberies perpetrated by Graham.[13] In sum, States have a "reasonable basis for believing" that life-without-parole for violent juvenile crime "'advance[s] the goals of [their] criminal justice systems in [a] substantial way.'" *Ewing*, 538 U.S.,

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[12] *See* Brief for Petitioner at 25-27, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 8, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009).

[13] *See* Brief of Respondent at 4-5, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6-9, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009).

at 28 (op. of O'Connor, J.) (quoting *Solem*, 463 U.S., at 297 n.22).

A. Legislation in Forty-Five States Allows Life-Without-Parole for Violent Juvenile Offenders.

The raw data from legislative enactments demonstrate an overwhelming judgment that life-without-parole is appropriate for certain juveniles who commit violent crimes. Overall, **forty-five** States have decided that juvenile offenders may be tried as adults and sentenced to life-without-parole. While they understandably do not highlight the point in their briefs, the Petitioners in both *Graham* and *Sullivan* broadly accept—if somewhat understate—these figures. *See* Brief for Petitioner at App'x C, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 49-50, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009). The State data break down as follows.

(1). Seven States allow the sentence for homicide crimes only.

The following six States allow life-without-parole sentences for juveniles convicted of homicide crimes only:

(1). **Connecticut** mandates automatic transfer of juveniles to adult court at age 14 for a capital felony, Class A or B felony or arson murder, CONN. GEN. STAT. ANN. § 46b-127 (2009), exposing them to a possible life-without-parole sentence for a capital felony, *id.* § 53A-35A (2008).

(2). **Hawaii** allows judicial waiver of a minor at any age for murder and attempted murder in the first and second degrees, HAW. REV. STAT. ANN. § 571-22(d) (2006), mandating a life-without-parole sentence upon conviction of murder or attempted murder in the first degree, *id.* § 706-656(1) (1993).[14]

(3). **Maine** mandates a bind-over hearing for juveniles at any age, ME. REV. STAT. ANN. tit. 15 § 3101(4) (2003), exposing them to a potential life-without-parole sentence for murder, *id.* tit. 17-a § 1251 (2006).

(4). **Massachusetts** automatically excludes from juvenile jurisdiction a 14-year-old charged with first degree murder, MASS. GEN. LAWS ANN. ch. 119 § 74 (2008), opening up a possible life-without-parole sentence, *id.* ch. 265 § 2 (2008).

(5). **New Jersey** mandates transfer for certain juveniles 14 or older, N.J. STAT. ANN. § 2A:4A-26 (2009), permitting a life-without-parole sentence, *id.* § 2C:11-3(b)(5) (2009), for murder where the victim is a law enforcement officer, *id.* § 2C:11-3(b)(2) (2009), or where

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[14] A minor convicted of murder or attempted murder in the second degree receives a mandatory sentence of life imprisonment with the possibility of parole. But a second-degree murder sentence may be enhanced to life-without-parole if "the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity," or if the minor was previously convicted of first or second degree murder in Hawaii or an equivalent crime in another State. *Id.* §§ 706-656(2); 706-657 (Supp. 2008).

the victim was under age 14 and was sexually assaulted, *id.* § 2C:11-3(b)(3) (2009).

(6). **New Mexico** defines a "serious youthful offender" as "an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder," N.M. STAT. § 31-18-15.2(A) (1996), thus allowing a life-without-parole sentence, *see id.* § 31-18-14 (2009) (amended by 2009 N.M. Laws, ch. 11, Sec. 1) (abolishing death penalty but providing that "the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole").[15]

(7). **Vermont** allows judicial transfer even from ages 10 to 13, VT. STAT. ANN. tit. 33, § 5204 (2007), thus exposing juveniles to a potential life-without-parole sentence for first or second degree murder, *id.* tit. 13, § 2303 (2005).

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[15] The previous version of N.M STAT. § 31-18-14 provided "if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he may be sentenced to life imprisonment but shall not be punished by death." The recently amended 31-18-14 no longer distinguishes between minors and adults, but specifically retains a possible life-without-parole sentence for both. *See also id.* § 31-18-15.3(D) (1993) (providing "court *may* sentence the [serious youthful] offender to less than, but not exceeding, the mandatory term for an adult," if guilty of first degree murder) (emphasis added).

(2). Thirty-eight States also allow the sentence for non-homicide crimes.

The following thirty-nine States additionally[16] provide that juveniles may be sentenced to life-without-parole for non-homicide violent crimes, such as sexual assault, burglary, armed robbery, and kidnapping:

(1). **Alabama** allows transfer to adult court of a juvenile from age 14, ALA. CODE § 12-15-203 (2009), thus permitting a life-without-parole sentence for felony offenses, including burglary and rape, *id.* §§ 13A-5-9(c)(3), (4) (2000); 13A-7-5 (2006); 13A-6-61 (2000).

(2). **Arizona** allows, and sometimes mandates, adult prosecution of juveniles age 14 and older, ARIZ. REV. STAT. § 13-501 (2009), thus exposing them to a potentially mandatory natural life sentence for certain violent sexual assaults, *see id.* § 13-1423 (2009).

(3). **Arkansas** allows juvenile transfer from age 14, ARK. CODE ANN. § 9-27-318 (2003), and so permits a life-without-parole sentence for multiple crimes including kidnapping, rape

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[16] Juvenile transferees in these States are also eligible (unless otherwise noted) for life without-parole for homicide crimes to the same extent as adults. For instance, in addition to the non-homicide crimes discussed *infra*, Delaware requires adult prosecution of juveniles for murder, DEL. CODE ANN. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus requiring a sentence of life-without parole for first degree murder, *id.* tit. 11, §§ 636; 4209(a) (2008), and permitting that sentence for second degree murder, *id.* tit. 11 §§ 635; 4205(b) & (j) (2008).

and aggravated robbery, *id.* § 5-4-501(c)(1)(b), (c)(2) (2009).

(4). **California** allows adult prosecution of persons under age 18, CAL. PENAL CODE § 1170.17 (2004), thus permitting life-without-parole upon multiple convictions of various non-homicide sexual assault and robbery crimes, *id.* §§ 667.7(a), (b) (2007).

(5). **Delaware** requires adult prosecution of juveniles for various crimes, including attempted murder, rape, assault, kidnapping and robbery, DEL. CODE ANN. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus allowing life-without-parole for attempted murder or rape, *id.* tit. 11 §§ 636; 531; 773; 4205(b) & (j) (2008).

(6). **Florida** makes juveniles of any age subject to indictment for crimes punishable by death penalty or life imprisonment, FLA. STAT. ANN. § 985.56 (2007), and thus makes life-without-parole available for certain sexual batteries, *id.* § 794.011(3) (2002), and certain burglaries, *id.* § 810.02(2) (2007).

(7). **Georgia** allows transfer for juveniles age 13 and 14 for aggravated battery and life imprisonment crimes, GA. CODE ANN. § 15-11.30.2(4) (2000), thus allowing life-without-parole for rape, *id.* § 16-6-1(b) (2006), and mandating it upon second conviction for various "serious violent felonies," including armed robbery, kidnapping, rape, and aggravated sexual battery, *id.* § 17-10-7(b)(2) (1994).

(8). **Idaho** provides discretionary transfer for juveniles of any age for crimes including murder, robbery, rape, and assault, IDAHO CODE §§ 20-508; 20-509 (2007), thereby making available life sentences for robbery and rape, *id.* §§ 18-6503, 18-6104 (2009).

(9). **Illinois** allows juvenile transfer at age 13 and mandates it at age 15, 705 ILL. COMP. STAT. 405/5-805(1)-(3) (2007), thus exposing juveniles to a possible natural life for certain sexual assaults, 730 ILL. COMP. STAT. 5/5-8-1(a)(2.5), (d)(4) (2009).

(10). **Indiana** requires transfer of "child" for felony prosecution, IND. CODE § 31-30-3-6(1) (2008), and thus makes available life-without-parole upon multiple convictions for various crimes, including sexual battery, robbery, and burglary (if each committed with a deadly weapon), *id.* § 35-50-2-8.5(a) (2009).

(11). **Iowa** allows transfer of juveniles age 14 and older, IOWA CODE § 232.45(6), permitting natural life imprisonment for Class A felonies, including kidnapping and sexua. abuse, *id.* §§ 902.1 (2003); 710.2 (2009), 709.2 (2003).

(12). **Louisiana** allows adult prosecution of juveniles age 14 and older, LA. CHILD. CODE art. 305 (2004); art. 857(A) (2004), thus permitting life-without-parole sentences for *15* year olds convicted of aggravated rape and aggravated kidnapping, LA. REV. STAT. ANN. §§ 14:42(D)(1) (2007); 14:44 (2007); *see* LA.

CHILD. CODE art. 857(B) (2004) (14-year-old transferee may only be imprisoned to age 31).

(13). **Maryland** provides discretionary transfer for a juvenile of any age for crimes punishable by death or life imprisonment, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-8A-06(a)(2) (2001); 3-8A-03(d)(1) (2001), and thus makes a juvenile subject to life-without-parole for first degree rape, MD. CODE ANN., CRIM. LAW § 3-303(d)(2) (2009).

(14). **Michigan** allows waiver for felonies committed by juveniles 14 and over, MICH. COMP. LAWS §§ 712A.4 (2002)); 769.1 (1) (2000); 764.27 (2000), and thus permits life-without-parole sentences for kidnapping, *id.* § 750.349(3) (2007), armed robbery, *id.* § 750.529 (2004), carjacking, *id.* § 750.529a(1) (2004), and recidivist controlled substances offenses, *id.* § 333.7413(1) (2001).

(15). **Minnesota** provides discretionary transfer for juveniles 14 or older, MINN. STAT. § 260B.125(1) (2007), allowing mandatory life-without-parole for certain sex offenses, *id.* §§ 609.055 (2009); 609.3455(2) (2009).

(16). **Mississippi** allows transfer for juveniles 13 or older, MISS. CODE ANN. § 43-21-157 (2009), thus exposing them to potential mandatory life-without-parole sentences for recidivist violent offenses, including sex crimes and robbery, *id.* §§ 47-7-3(1)(a) (2009); 99-19-81 (1977); 99-18-83 (1977).

(17). **Missouri** has discretionary transfer for juveniles 12 or older, MO. REV. STAT. § 211.071(1) (2009), and so allows a mandatory life-without-parole sentence for persistent sexual offenders, *id.* § 558.018 (2009), and for some drug offenses, *id.* §§ 195.222 (2004); 195.223 (2004), and for persistent drug offenders, *id.* §§ 195.214 (2004); 195.218 (2004).

(18). **Montana** allows transfer from age 12 for certain felonies (from age 16 for others), MONT. CODE ANN. § 41-5-206(1)(a), (b) (2007), thus allowing a life-without-parole sentence, *id.* §§ 41-5-2503(1)(a) (1999); 46-18-202(2) (2007), for crimes such as aggravated kidnapping, *id.* § 45-5-303 (1995), non-consensual sexual intercourse, *id.* § 45-5-503 (2007), and aggravated assault while in official detention, *id.* § 46-18-220 (2001).[17]

(19). **Nebraska** allows discretionary prosecution for juveniles under age 16, NEB. REV. STAT. §§ 43-247 (2008); 43-276 (2008), thereby authorizing a life-without-parole sentence, *id.* §§ 29-2204 (2002); 28-105 (2002), for all class IA, and IB felonies, including first and second degree murder, kidnapping and sexual assault of a child, *id.* §§ 28-303 (2008); 28-304 (2008); 28-313(2) (1977); 28-319.01 (2009).

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[17] Montana permits, but does not mandate, juvenile life-without-parole for homicide. *See id.* §§ 46-18-219(1)(a)(i) (2001); 46-18-222(1) (2007).

(20). **Nevada** excludes from juvenile jurisdiction certain sexual assault and firearm crimes at age 16 for previously-adjudicated delinquents, certain felonies on school property resulting in death or great bodily harm for any age, and other recidivist crimes for any age, NEV. REV. STAT. § 62B.330(b)-(e) (2004),[18] thus permitting life-without-parole sentences for, *inter alia*, certain sexual assaults, *id.* § 200.366(2)-(4), battery with the intent to commit sexual assault, *id.* § 200.400(4), and habitual criminal offenses, *id.* §§ 207.010(1)(b)(1); 207.012(1)(b)(1).

(21). **New York** provides generally that "a person less than sixteen years old is not criminally responsible for conduct," N.Y. PENAL LAW § 30.00(1) (2008), thus allowing a mandatory life-without-parole sentence for a sixteen-year-old convicted of terrorism crimes involving a class A-I felony such as first-degree kidnapping, *id.* §§ 490.25(d) (2008); 135.25 (2009).[19]

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[18] Additionally, a juvenile court has discretion to certify as an adult a juvenile age 14 or older charged with an offense punishable as a felony, and is required to certify a juvenile age 14 or older charged with certain violent sexual assault or firearm crimes. *Id.* §§ 62B.390(1), (2) (2004).

[19] *See also id.* § 70.00(5) (2009) (allowing life-without-parole sentence for sixteen-year-old convicted of second-degree murder); *cf. id.* § 30.00(2) (2009) (allowing 13-, 14-, or 15- year old to be found criminally responsible for second degree murder); § 70.05(2)(a) (2009) (mandating maximum term of life imprisonment for juvenile offender convicted of second degree murder).

(22). **New Hampshire** allows juvenile transfer from age 13, N.H. REV. STAT. ANN. §§ 628:1(II) (2004); 169-B:24(II) (2004), and thus permits life-without-parole for multiple convictions of sexual assault, *id.* § 651.6(III)(e) (2009).

(23). **North Carolina** provides that a juvenile 13 or older may be sentenced to life-without-parole for violent habitual offenses, N.C. GEN. STAT. § 14-7.12 (2007), for a second conviction of first degree rape or sexual assault, *id.* § 15A-1340.16B(a) (2007), or for committing a Class B1 felony while wearing or possessing a bullet proof vest, *id.* § 15A-1340.16C (2007). *See* N.C. GEN. STAT. § 7B-2200 (2007).

(24). **North Dakota** requires adult prosecution of juveniles 14 and older for certain crimes, N.D. CENT. CODE §§ 27-20-34 (2007); 12.1-04-01 (1981), permitting life-without-parole for gross sexual imposition, *id.* §§ 12.1-20-03 (2009); 12.1-32-01(1) (1997).

(25). **Ohio** makes juveniles 14 or older eligible for discretionary transfer, OHIO REV. CODE ANN. § 2152.10(B) (2002), allowing them to be sentenced to life-without parole for rape under certain circumstances, *id.* §§ 2152.12 (2000); 2907.02 (2007), 2971.03 (2007).

(26). **Oklahoma** allows juveniles ages 14 or older to be prosecuted and sentenced as adults, OKLA. STAT. tit. 10A, §§ 2-5-204; 2-5-206 (2009), thus permitting mandatory life-

without-parole on second offense of forcible sodomy and rape, *id.* tit. 21, § 51.1a (2009).

(27). **Oregon** does not allow life-without-parole for juveniles transferred to adult court, *see* OR. REV. STAT. ANN. § 161.620 (2009), but would allow the sentence for 15- to 17-year-old juveniles direct-charged, *id.* § 137.707(1) (2009), for crimes such as aggravated murder and third-strike Class A felony sex crimes, *id.* §§ 163.150(3) (2009); 137.719(1) (2003).

(28). **Pennsylvania** allows, and in many cases requires, adult transfer of juveniles ages 14 and over, 42 PA. CONS. STAT. §§ 6355(a) (2000); 6302 (2000), allowing life-without-parole sentences for third-offense violent crimes and for certain rapes, *id.* § 9714(2) (2007); 18 PA. CONS. STAT. § 3121(e)(2) (2000); 61 PA. CONS. STAT. § 331.21(a) (1999).

(29). **Rhode Island** allows a juvenile of any age to be tried as an adult for crimes punishable by life, R.I. GEN. LAWS § 14-1-7 (1990), making a life-without-parole sentence available for a third-offense crime of violence involving a firearm, *id.* § 11-47-3.2(a) (2000).

(30). **South Carolina** allows juveniles 14 or older to be tried as adults for serious felonies, S.C. CODE ANN. § 63-19-1210 (2008), exposing them to life-without-parole sentences for committing, or aiding in committing, first-degree burglary, criminal sexual battery on minors under 11, and second conviction of crimes including robbery, burglary, kidnapping and criminal sexual conduct, *id.*

§§ 16-1-40 (2003); 16-11-311(B) (1995); 16-3-655(A)(1) (2008), 17-25-45 (2009).

(31). **South Dakota** allows adult transfer of felony-charged juveniles 10 and older (requiring it at age 16), S.D. CODIFIED LAWS §§ 26-11-4 (1997); 26-11-3.1 (2006); 22-3-1 (2005), thus permitting life-without-parole for all Class A, B and C felonies, including kidnapping and rape, *id.* §§ 22-22-1 (2005); 22-19-1 (2005); 22-6-1 (2005); 22-15-4 (2004).

(32). **Tennessee** allows adult transfer of any juvenile for serious crimes, TENN. CODE ANN. § 37-1-134 (a)(1) (2006), thus mandating life-without-parole sentences for repeat violent offenses including rape and aggravated burglary, *id.* § 40-35-120(g) (1995);

(33). **Utah** allows certification to adult court of juveniles 14 and older charged with felonies, UTAH CODE ANN. § 78A-6-703 (2008); 78A-6-602(3) (2008); 76-2-301 (1973), permitting a life-without-parole sentence for crimes including aggravated kidnapping and sexual assault, *id.* §§ 76-3-406 (2009); 76-5-302(3) (2007); 76-5-405(2) (2009).

(34). **Virginia** allows adult transfer for juveniles 14 or older charged with felonies, VA. CODE ANN. § 16.1-269.1 (1997), making them eligible for life-without-parole for third offense of crimes such as rape and armed robbery, *id.* § 53.1-151(B1) (1993).

(35). **Washington** allows adult transfer of juveniles 8 or older, WASH. REV. CODE §§

13.40.110 (2009); 9A.04.050 (1975), exposing them to life-without-parole sentences for multiple convictions of class A felonies, *id.* §§ 9.94A.570 (2000); 9.94A.505 (2009).

(36). **West Virginia** mandates for certain serious offences adult transfer of juveniles 14 and older, and allows transfer of juveniles of any age, W. VA. CODE § 49-5-10(b)-(e) (2001), allowing a life-without-parole sentence for kidnapping, *id.* § 61-2-14a(a) (1999).

(37). **Wisconsin** generally allows transfer of juveniles age 14 and older, while mandating transfer of any juveniles for certain crimes, WIS. STAT. §§ 938.18 (2009); 938.183 (2009), and thus permits a life-without-parole sentence for "persistent repeat" felony offenses, *id.* §§ 939.62(2m)(c) (2005); 973.014 (1998).

(38). **Wyoming** allows transfer of juveniles 13 and older, WYO. STAT. ANN. § 14-6-237 (2004), permitting life-without-parole sentences for recidivist sex offenders, *id.* § 6-2-306(d) (2007).

(3). Only four States specifically disallow life-without-parole, while still allowing lengthy mandatory terms.

Only four States—Colorado, Kansas, Kentucky, and Texas—specifically disallow juvenile life-

without-parole sentences for any crime.[20] Even so, these States would allow juveniles to be sentenced to mandatory prison terms of up to 50 years before parole eligibility. *See, e.g.,* TEX. PENAL CODE § 12.31 (2009); TEX. GOV'T CODE § 508.145(b) (2009) (imposing mandatory life on juveniles convicted of capital felony, with parole available only after serving "40 calendar years"); COLO. REV. STAT. ANN. § 18-1.3-401(4)(b)(I) (2009) (same for class 1 felonies); KAN. STAT. ANN. 21-4635(b) (2004) (allowing mandatory sentence of 50 years for first degree murder upon finding of aggravating factors).

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[20](1). **Colorado,** COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) (2009) (changing law in 2006 to mandatory life sentence with possibility of parole after 40 years).

(2). **Kansas,** KAN. STAT. ANN. § 21-4622 (2004) (removing sentence in 2004).

(3). **Kentucky,** KY. REV. STAT. ANN. § 640.040(1) (1998); *Shepherd v. Commonwealth,* 251 S.W.3d 309, 320-21 (Ky. 2008) (interpreting § 640.040(1) to allow only life-without-parole for 25 years for Class A felony).

(4). **Texas,** TEX. PENAL CODE § 12.31 (2009) (amended effective September 1, 2009, to remove possibility of life-without-parole for capital felony); *see also* 2009 TEX. SESS. LAW SERV. Ch. 765 (S.B. 839) (Sept. 1, 2009).

Alaska makes parole available for any crime, whether committed by adults or juveniles. *See* ALASKA STAT. § 12-55-015(g) (2009) (providing for mandatory parole eligibility).

(4). Both the District of Columbia and the federal government allow juvenile life-without-parole for non-homicide crimes.

The judgment of the vast majority of States to allow life-without-parole sentences for violent juvenile crime is reinforced by the District of Columbia and the federal government, both of which allow such sentences for homicide and violent non-homicide crimes. The District of Columbia allows filing of a delinquency petition without reference to a juvenile's age. *See* D.C. CODE ANN. § 16-2305 (2005). While a juvenile convicted in the District of first degree murder may not receive life-without-parole, *id.* § 22-2104 (2001), juveniles are nonetheless eligible for life-without-parole sentences for the murder of a law-enforcement officer, *id.* § 22-2106 (2002), for terroristic first-degree murder, *id.* § 22-3153(a) (2002), for aggravated first-degree sexual abuse, *id.* § 22-3020(a) (2001), and for recidivist crimes of violence, *id.* § 22-1804a(a)(2) (2001).

The United States allows adult prosecution of juveniles age 15 or older for crimes of violence and certain controlled substance and firearm offenses. 18 U.S.C. § 5032 (1996). Adult prosecution is authorized for 13-year-olds for specified crimes within federal maritime or territorial jurisdiction, including murder, manslaughter, certain aggravated sexual abuse offenses, armed robbery, and assault. *See id.* (citing 18 U.S.C. §§ 113(a)-(c); 1111; 1113; 2111; 2113; 2241(a), (c)). These transfer provisions expose juveniles as young as 13 years old to mandatory life-without-parole sentences for

multiple violent felony convictions. *See* 18 U.S.C. § 3559(c)(1), (c)(2)(F) (2006).[21] [22]

B. Evolving Transfer Provisions Show that States Have Consciously Toughened Juvenile Sentencing.

Illuminating the raw data from state legislation are the statutory mechanics making juveniles eligible for life-without-parole. Juvenile offenders may be tried as adults generally through three "transfer" or "waiver" mechanisms: judicial waiver, legislative offense exclusion, and prosecutorial direct-file. *See generally* Feld, *supra*, at 38-39 (discussing mechanisms); Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, Aug. 2008, at 1-2 ("Redding") (same); *see also* Parts II.A.1 & II.A.2, *supra* (detailing state transfer laws).

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[21] Additionally, 17-year-olds may enlist in the United States Military, *see* 10 U.S.C. § 505(a) (2008), and are thus eligible for life-without-parole, *id.* § 856a (2000), for crimes including murder, child rape, and other crimes for which a court-martial may impose a life sentence, *id.* §§ 918 (2000); 920 (2007); *see also United States v. Christian*, 63 M.J. 205 (2006) (generally discussing life-without-parole sentences under military law).

[22] A bill pending before a House subcommittee, the "Juvenile Justice Accountability and Improvement Act of 2009," would require the United States to provide juvenile offenders periodic opportunities for parole or supervised release "not less than once during the first 15 years of incarceration, and not less than once every 3 years thereafter." H.R. 2289, 111th Cong. § 5 (considered as such by House subcommittee, June 9, 2009). The bill would also withhold certain federal funds from any States that did not establish such a parole system. *Id.* § 3.

Through such provisions, States make a conscious election respecting juvenile punishment: "[w]aiver of juvenile court jurisdiction presents the *stark choice* between treating a youth in the juvenile system and punishing him in the criminal justice system." Feld, *supra*, at 38 (emphasis added).[23] The evolution of state transfer mechanisms over the past several decades evidences an unmistakable "nationwide policy shift toward transferring juvenile offenders to the criminal court." Redding, *supra*, at 2.[24]

"The evolution in youth violence and homicide rates in the late 1980s and early 1990s caused almost every state to revise its laws to transfer more juveniles in criminal court." Feld, *supra*, at 40. Scholars in this area report that, from 1979 to 2003, the number of States requiring *automatic* transfer from juvenile to adult court rose from 14 to 31. *See* Redding, *supra*, at 1 (citing B. Steiner & C. Hemmens, *Juvenile waiver 2003: Where are we now?*, 54(2) JUVENILE AND FAMILY COURT JOURNAL 1-24 (Spring 2003)). Another scholar observes that "[i]n a three-year period, between 1992 and 1995,

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[23] *See also, e.g., State v. Rauch*, 13 P.3d 324, 333 (Haw. 2000) (reasoning that juvenile transfer provisions "clearly evince[] a legislative policy" regarding the relative severity of juvenile crime).

[24] *See also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 688 (1998) ("Logan") (explaining that "[w]ith these changes [*i.e.* to state transfer laws] has come a dramatic expansion in the scope and number of juvenile offenders eligible, or indeed required, to be prosecuted in adult court").

forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court." Logan, *supra*, at 688 (citing Melissa Sickmund *et al.*, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 29).[25] Symptomatic of deeper sociological and philosophical debates over juvenile punishment, *see infra* Part III, such trends show States deliberately "adopt[ing] punitive laws to transfer more and younger offenders to criminal courts and to punish them more severely." Feld, *supra*, at 34; *see also* Redding, *supra*, at 1 (observing that expansion of transfer laws was part of "legal reforms designed to get tough on juvenile crime").

These trends explain why juvenile offenders in a super-majority of States are, today, more readily subject to life-without-parole sentences. Whereas "prior to the 1970s, virtually no states imposed [life-without-parole] sentences," movement toward greater severity has altered the landscape—so dramatically, in fact, that in one scholar's reckoning:

> judges now sentence youths to [life-without-parole] three times as frequently as they did in 1990. The average age at which juveniles committed the crimes for which courts impose [life-without-parole] sentences is

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[25] *See also* Patricia Torbet *et al.*, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3-9 (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) ("O.J.J.D.P. REPORT") (documenting "trend" from 1992-95 that "[m]ore serious and violent juvenile offenders are being removed from the juvenile justice system in favor of criminal court prosecution").

> sixteen years, but children as young as thirteen years of age receive such sentences.

Feld, *supra*, at 69-70. This juvenile sentencing trend coincides with an overall increase in life-without-parole sentences for all offenders. *See, e.g.*, Ashley Nellis & Ryan S. King, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 4-6, 8-9 (The Sentencing Project) (July 2009) (reporting that over last quarter-century, the number of individuals serving life sentences has quadrupled, and that between 1992 and 2008 the number serving life-without-parole sentences has tripled).[26]

Death-penalty opponents have encouraged these juvenile sentencing trends by "provid[ing] bipartisan support for [life-without-parole] sentences as an alternative to capital punishment." Feld, *supra*, at 69 (citing Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006)). Life-without-parole "is seen as a sentencing compromise by both ends of the political spectrum," because it promises strong deterrence without the death penalty's political and moral baggage. Logan, *supra*, at 690 n.37. This Court has itself taken a similar view, observing in *Roper* that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." 543 U.S., at 572.

Finally, confirmation of these sentencing trends comes also from opponents of juvenile life-without-

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[26] Report available at http://www.sentencingproject.org/doc/publications /inc_noexit.pdf.

parole. Even those who decry sentencing any juvenile to life-without-parole admit that sentencing trends have headed toward greater severity. For instance, Amnesty International / Human Rights Watch candidly recognizes "[t]he dramatic increase in the imposition of life without parole sentences" on juvenile criminals:

> [S]tates have by no means abandoned the use of life without parole for child offenders: the estimated rate at which the sentence is imposed on children nationwide remains at least three times higher today than it was fifteen years ago.

Amnesty International / Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2-3 (2005).[27] Scholars opposed to the practice similarly admit to contrary developments, such as the reality that "[c]ourts regularly uphold [life-without-parole] sentences and extremely long terms of imprisonment imposed on twelve-, thirteen-, fourteen-, or fifteen-year-old youths." Feld, *supra*, at 67 (and collecting cases).

III. STATE LEGISLATURES ARE BEST SITUATED TO SET JUVENILE SENTENCING POLICIES.

Calibrating juvenile sentences implicates profound political, sociological, philosophical and moral issues. Consequently, actors accountable to the people should be the ones to shoulder, and answer for, this difficult task. This is always where

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[27] Report available at http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

our nation has deliberated the delicate issues presented by juvenile crime and punishment.[28] Thus, in 1996 the U.S. Department of Justice could report that

> States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.

O.J.J.D.P. REPORT, *supra*, at iii. Given their accumulated wisdom and political accountability, weighing the application of juvenile life-without-parole sentences should remain firmly within the States' discretion.

A. Officials Who Calibrate Juvenile Sentencing Must Remain Directly Accountable to Their Citizens.

It is a simple fact that our nationwide trend toward stringent juvenile sentences has grown out of considered legislative responses to increased

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[28] *See, e.g.*, Feld, *supra*, at 12-17 & nn. 3, 17, 21 (discussing history of juvenile court system) (citing, *inter alia*, David S. Tannenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 46 (Margaret K. Rosenheim *et al.* eds. 2002); JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 122 (1988); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 22 (1978)).

violent juvenile offenses.[29] The unfortunate but undeniable reality is that the United States has higher rates of juvenile crime than most Western nations.[30] But the incidence and nature of juvenile crime has varied over time, and will continue to

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[29] *See, e.g.*, Human Rights Watch, *supra*, at 15 (reporting that "[s]tarting in the mid-1980s, the United States experienced a steep and troubling increase in violent crime, including violent crime by adolescents"); Feld, *supra*, at 29 (observing that a "sharp spike in juvenile arrests for violence and homicide occurred between 1986 and 1994" and that "[t]he overall arrest rates of all youths for violent index crimes increased nearly two-thirds (66%)") (and collecting sources); Logan, *supra*, at 681 n.1 (reporting that "[b]etween 1983 and 1992, juveniles accounted for 25% of the increase in murders, forcible rapes, and robberies" and "[b]etween 1988 and 1992, the number of juveniles arrested for murder increased by 51% (as opposed to 9% for adults)") (and collecting sources)); O.J.J.D.P. REPORT, *supra*, at xi (reporting in 1996 that "[n]early every State has taken legislative or executive action in response to escalating juvenile arrests for violent crime and public perception of a violent juvenile crime epidemic").

[30] *See, e.g.*, Charles D. Stimson & Andrew M. Grossman, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 21-22 (Heritage Foundation, Center for Legal and Judicial Studies Aug. 2009) ("ADULT TIME FOR ADULT CRIMES") (reporting that the United States "ranks highly in every category" of juvenile crime statistics) (citing statistical evidence from DIVISION FOR POLICY ANALYSIS AND PUBLIC AFFAIRS, UNITED NATIONS OFFICE ON DRUGS AND CRIME, SEVENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS (1998-2000) 99-100, 154-155 (2004), *available at* http://wwwundoc.org/pdf/crime/seventh_survey/7pv.pdf); WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 28-29 (2002), *available at* http://whqlibdoc.who.int/hq/2002/9241545615.pdf)).

fluctuate.[31] Only politically-accountable state (and federal) representatives have the necessary flexibility and incentives to adjust juvenile sentences to changing circumstances. Consequently, it is to those same representatives that pleas to mitigate or enlarge—or abolish—juvenile life-without-parole sentences are properly made. *See, e.g.*, Feld, *supra*, at 76-81 (discussing state legislative consideration).

Political accountability is critical here, because adjusting juvenile sentences is not a mere bookkeeping exercise. It is instead a delicate endeavor bound up with competing philosophies of crime and punishment. Movement toward stricter sentences over recent decades thus "represents both a reaction to the increasingly serious nature of juvenile crime and a fundamental shift in juvenile justice philosophy." O.J.J.D.P. REPORT, *supra*, at xi.

Well-known are the longstanding debates over "root cause" versus responsibility-based theories of crime, and over rehabilitative versus retributive approaches to punishment.[32] As juvenile sentencing

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[31] *See, e.g.*, Feld, *supra*, at 12 & n.1 (noting "oscillating" nature of youth crime policies) (and citing THOMAS J. BERNARD, THE CYCLE OF JUVENILE VIOLENCE (1992)); ADULT TIME FOR ADULT CRIMES, *supra*, at 19-21 (noting that, according to U.S. Department of Justice, "between 1994 and 2004, the arrest rate for juveniles for violent crimes fell 49 percent, only to see a 2 percent uptick in 2005 and then a 4 percent gain in 2006") (citing Howard Snyder, *Juvenile Arrests 2006*, JUVENILE JUSTICE BULLETIN, Nov. 2008, at 1)).

[32] *See, e.g.*, Feld, *supra*, at 25-42 (chronicling the philosophical and sociological debates over juvenile punishment) (and collecting sources); Logan, *supra*, at 685-86 (discussing these debates and observing that "[i]n recent years

scholar Barry Feld has explained, "[t]he ideology, structure, and practices of juvenile justice evolved over time in a politically contested context." Feld, *supra*, at 16-17. Consequently, the U.S. Department of Justice accurately described the last several decades' trend towards stricter juvenile punishment as "a fundamental philosophical departure, particularly in the handling of serious and violent juvenile offenders" that has "resulted in dramatic shifts in the areas of jurisdiction, sentencing, correctional programming, confidentiality, and victims of crime." O.J.J.D.P. REPORT, *supra*, at xi. It is precisely because "the Eighth Amendment does not mandate adoption of any one penological theory," *Harmelin*, 501 U.S., at 999 (Kennedy, J., concurring), that the Constitution leaves to the accumulated wisdom of State actors the resolution of these profound questions.

B. States Have Crafted Juvenile Sentencing Policies that Wisely Balance Justice with Mercy.

The States have been at the forefront of confronting the delicate issues presented in these cases. For instance, in 2006 the Colorado Legislature adopted a somewhat more rehabilitative sentencing model by lowering the maximum sentence for a juvenile convicted of a class 1 felony from mandatory life-without-parole to mandatory life with parole possible after 40 years. *See* 2006

... juvenile justice has experienced a sea-change in philosophy and practice"); ADULT TIME FOR ADULT CRIMES, *supra*, at 19-20 (observing that "[t]he root causes of this epidemic have been debated, studied, tested, and analyzed for decades").

COLO. LEGIS. SERV. Ch. 228 (H.B. 06-1315) (July 1, 2006) (amending, *inter alia*, COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) (2009)). In doing so, Colorado embraced some of the same philosophical premises about juvenile psycho-social development that Petitioners themselves advocate. *See id.* Ch. 228 §1 (reciting legislative declarations); *and see* Brief for Petitioner at 11-41, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009).[33] Texas, too, has recently amended its penal law to remove mandatory juvenile life-without-parole for a capital felony. *See* 2009 TEX. SESS. LAW SERV. Ch. 765 (S.B. 839) (Sept. 1, 2009) (amending TEX. PENAL CODE § 12.31 (2009)). Instead, Texas now imposes a mandatory life sentence with parole eligibility after 40 years. *See* TEX. GOV'T CODE § 508.145(b) (2009).[34]

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[33] Similarly, in 2007 a state commission recommended that the North Carolina Legislature adopt certain changes to its juvenile sentencing policy based on a "more rehabilitative" model. *See* REPORT ON STUDY OF YOUTHFUL OFFENDERS at IV(1), cmt. (a) (North Carolina Sentencing and Policy Advisory Comm'n) (March 2007), *available at* www.nccourts.org/Courts/CRS/Councils/spac/Documents/yo_finalreporttolegislature.pdf; *see also* Feld, *supra*, at 80-81 (discussing North Carolina commission proposal). A bill entitled the "Youth Accountability Act" (H.B. 1414) is currently pending in a House committee and, if adopted, would raise the age of an adult from 16 to 18 over a period of years, but would still require mandatory transfer of anyone over 13 for a Class A felony. The current text of the bill and a summary of action on the bill can be found at: http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1414.

[34] Bills pending in the Michigan Legislature would remove the possibility of juvenile life-without parole. *See* H.B.

Of course, legislative developments such as those in Colorado and Texas lie at the margins of the nationwide picture.[35] Other States—such as Alaska, Delaware, and Nevada—have recently gone in the opposite direction by toughening their juvenile transfer laws.[36] But the overall picture, as described *supra* in Part II.A, is most telling: 90% of the States continue to allow life-without-parole sentences for a wide variety of violent crimes, as do the District of Columbia and the federal government.

And there is a deeper lesson to draw from State legislative developments: the States are well equipped to face the challenges of juvenile sentencing. States have carefully adjusted, and will

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4518, 4594-95; S.B. 173-176, 1999 Leg., 95th Sess. (Mich. 2009), *analysis available at* http://www.legislature.mi.gov.

[35] *See, e.g.*, Feld, *supra*, at 77-78 (observing that only "[a] few state legislatures have taken some initial steps" towards mitigating juvenile sentencing, and discussing only Colorado as eliminating mandatory life-without-parole); Redding, *supra*, at 1 (observing that, while most States have toughened juvenile transfer laws over the past three decades, "very recently, some States have reduced the scope of transfer laws") (citing Bishop, *Injustice and irrationality in contemporary youth policy*, 3 CRIMINOLOGY & PUBLIC POLICY 633-44 (2004)).

[36] *See, e.g.*, Feld, *supra*, at 77 & n.362 (discussing enactment of more stringent juvenile transfer provision in Alaska (2005)) (referring to 2005 amendment to ALASKA STAT. § 41.12.030(a)); 74 DEL. LAWS c. 106, §§ 28, 33 (2003) (adding robbery first degree and assault first degree to those crimes requiring adult prosecution of any juvenile); NEV. SENATE BILL No. 235, § 2 (enacting new chapter 62B of the Nevada Revised Statutes related to juvenile transfer hearings) (eff. Oct. 1, 2009) (text and commentary available at http://www.leg.state.nv.us/75th2009/Bills/SB/SB235_EN.pdf).

continue to adjust, their sentencing policies to the continually changing incidence of juvenile crime. States have carefully weighed, and will continue to weigh, the nature of juvenile culpability, punishment, rehabilitation, and deterrence in all their dimensions—philosophical, moral, sociological, and scientific.

The most concrete confirmation of this is found in the kaleidoscope of state transfer provisions through which juveniles may become subject to adult sentences. *See generally* Parts II.A.1 & II.A.2, *supra* (detailing state transfer provisions). These mechanisms dramatize the States' profound investment in the problems of juvenile crime. Unsurprisingly, the States' approaches vary considerably. They allow, and sometimes mandate, juvenile transfer for adult prosecution at a wide range of ages for an array of offenses, reflecting "[t]he inherent nature of our federal system." *Harmelin*, 501 U.S., at 999 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 291 n.17).

But most importantly, the transfer provisions are concrete evidence of State expertise in juvenile sentencing. They show that the States have crafted mechanisms for addressing—with both realism and hope, rigor and compassion—the terrible dilemmas associated with sentencing juveniles for terrible crimes.

Ohio's transfer provision provides an excellent example of this sort of evenhanded sensitivity. *See generally* OHIO REV. CODE ANN. § 2152.12 (2000). In considering certain transfers, a juvenile court must deem the following factors to favor transfer:

- The nature of the harm done to the victim, *id.* § 2152.12(D)(1-2);
- Whether "the child's relationship with the victim facilitated the act charged," *id.* § 2152.12(D)(3);
- Whether "[t]he child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity," *id.* § 2152.12(D)(4);
- Whether the crime involved certain uses of a firearm, *id.* § 2152.12(D)(5);
- The child's juvenile record and whether "[t]he results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system," *id.* § 2152.12(D)(6-7);
- Whether the "child is emotionally, physically, or psychologically mature enough for the transfer," *id.* § 2152.12(D)(8); and
- Whether "[t]here is ... sufficient time to rehabilitate the child within the juvenile system," *id.* § 2152.12(D)(9).

But the court must consider the following factors as *against* a transfer:

- Whether "[t]he victim induced or facilitated the act charged," *id.* § 2152.12(E)(1);
- The nature of the child's responsibility and whether "the child was under the negative influence or coercion of another person," *id.* § 2152.12(E)(2-3);

- The absence of physical harm to person or property, *id.* § 2152.12(E)(4);
- Whether "[t]he child is not emotionally, physically, or psychologically mature enough for the transfer," and whether "[t]he child has a mental illness or is a mentally retarded person, *id.* § 2152.12(E)(6-7); and
- Whether "[t]here is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety." *Id.* § 2152.12(E)(8).

While Ohio's transfer statute is unusually articulate, the state transfer mechanisms are filled with such requirements. Far from showing the States' thoughtless cruelty towards juvenile offenders, they are instead compelling evidence of their sensitivity, flexibility, and realism in dealing with juvenile violence.

CONCLUSION

When to be merciful to a juvenile who has committed a terrible crime? When to punish? What weight to give deterrence? What weight rehabilitation? And, most difficult of all: when to rule out the possibility of release? No one wants the responsibility for answering these agonizing questions, but they must be answered. The Constitution leaves that arduous but necessary task to the collective wisdom of the States and their citizens.

The Court should affirm the decisions of the Florida First District Court of Appeal.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 08-7412 & 08-7621

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF *AMICI CURIAE* OF THE MOTHERS AGAINST MURDERERS ASSOCIATION, ROBERT HOELSCHER, RUTH JOHNSON, AZIM KHAMISA, BILL PELKE, AQEELA SHERRILLS, TAMMI SMITH, AND LINDA WHITE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. *Amici* urge the court to consider voices all victims, including those who oppose life without parole for juveniles because such sentences do not satisfy the principles of proportionality, rehabilitation and forgiveness.	2
II. The experiences of *amici* show that juvenile life without parole fails to appropriately reflect proportionality, rehabilitation and forgiveness.	5
A. Aqeela Sherrills knows firsthand that change is possible, and he believes that even his firstborn son's killer deserves a chance to change. .	6
B. Robert Hoelscher is tough on crime yet finds it inconceivable to sentence juveniles like adults for crimes committed under the misguided influence of youth.	10

Contents

Page

C. Tammi Smith feels her half-brother's killer has shown he deserves a second chance. 14

D. Linda White does not believe life sentences without the possibility of parole serve anyone. 17

E. Ruth Johnson does not believe the punishment fits the crime for the 17-year-old killer of her son. 20

F. Azim Khamisa is working together with the family of his son's killer to curb youth violence and help their communities heal. 22

G. Bill Pelke believes all juveniles, including his grandmother's killer, can be turned around. 24

H. Ninety-eight mothers of murder victims comprise *Mothers Against Murderers Association*, a non-profit organization created to serve victims who seek resolution and forgiveness as well as justice. 26

CONCLUSION 32

TABLE OF CITED AUTHORITIES

Page

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 3

Other Authorities

Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 2

Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000) 4

L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417 (2000) ... 3

Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992) 3-4

The Victims' Rights Amendment, 42 Harv. J. on Legis. 525 (2005) 2

INTEREST OF *AMICI*[1]

Amici are individuals who have lost family members to violent crime committed by juveniles yet oppose life sentences without the possibility of parole for juveniles. *Amici* also include an organization whose mission focuses on assisting such crime victims and whose activities and experiences have led the organization to stand against life sentences without parole for juveniles. Because the interests of other juvenile crime victims will be uniquely and significantly impacted by the resolution of this case, *amici* submit their testimonials in hopes of giving voice to their reasoned opposition to juvenile life without parole.

SUMMARY OF ARGUMENT

Recognizing that this Court is examining whether criminal acts less severe than murder merit a sentence of life without parole where the offenders are juveniles, *amici* urge the Court to hold that this sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. Victims differ in their views on proportionality of punishment for juvenile offenders and the importance of allowing juvenile offenders to be released from prison upon rehabilitation. In considering what is cruel and unusual, therefore, this Court should not assume all victims would support the continued

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[1] The parties have consented to the filing of amicus briefs in this case and filed consent letters with the Clerk. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

imposition of life without parole sentences upon juveniles. *Amici* contend that proportionality, rehabilitation and forgiveness must be the governing principles of juvenile sentencing. These principles are ill-served by sentencing children to life without the possibility of parole.

ARGUMENT

I. *AMICI* URGE THE COURT TO CONSIDER VOICES OF ALL VICTIMS, INCLUDING THOSE WHO OPPOSE LIFE WITHOUT PAROLE FOR JUVENILES BECAUSE SUCH SENTENCES DO NOT SATISFY THE PRINCIPLES OF PROPORTIONALITY, REHABILITATION AND FORGIVENESS.

Victims who constitute *amici* here believe proportionality, rehabilitation and forgiveness must guide decisions involving the sentencing of juvenile offenders. They advocate for those strongly-held values to be reflected as paramount in our nation's juvenile justice system.

The federal government and all 50 states legislatively recognize the victim's voice in sentencing defendants, including juveniles. *See, e.g.*, Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) (listing victims' rights statutes); Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771. The various statutes reflect the importance of considering victims' views of both the harm suffered and the proper punishment for defendants.

Proportionality is central to our penal system. It is axiomatic that a defendant should not be punished to a greater extent than the offense merits. *See Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (and cases cited therein). This fundamental tenet is captured in the Eighth Amendment's prohibition against cruel and unusual punishment, which forbids penalties that are disproportionate to the offense. *See id.* A penalty is constitutionally disproportionate if it is out of step with contemporary societal values. *Id.* at 312. In addition to examining objective evidence of contemporary values, this Court has said that it must also bring its own reasoned judgment to bear on whether a particular form of punishment is constitutionally disproportionate. *Id.* at 313. Because victims' voices are legally relevant to sentencing courts across the nation, *amici* urge this Court to consider *amici's* experiences as a particularly poignant indicator of contemporary values that should inform this Court's reasoned judgment.

Amici have experienced firsthand what science is now documenting. As addressed in other *amicus* briefs submitted in support of Petitioners, landmark scientific research now reveals that adolescents are less capable of controlling their behavior than adults. Recent psychological, neurological and behavioral studies establish that children cannot appreciate consequences and assess risk and harm the way adults can, in part because their brains continue to develop through their teen years. *See, e.g.*, L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417, 421 (2000); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12

DEVELOPMENTAL REV. 1, 9-11 (1992); Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002). Thus, *amici* believe that punishing children to the same extent as adults – who are mentally and developmentally capable of assessing the consequences and impact of their crimes in a way children cannot – offends the core principle of proportionality.

Amici believe that children are fundamentally redeemable. The principle of rehabilitation – providing offenders a second chance at a productive, law-abiding life – has special resonance in cases involving juvenile offenders. The same studies cited above also show that juveniles can be successfully rehabilitated. This brief contains several accounts where *amici* have personally witnessed the rehabilitation of the juveniles they have come to know through tragic events. They have observed that juvenile offenders mature and develop through participation in rehabilitation programs. Many *amici* recognize that the adult still serving the prison sentence is an entirely different person from the juvenile who committed the crime that led to the original sentence. For these reasons, *amici* believe juvenile offenders should be offered a legitimate chance at complete rehabilitation which they feel cannot be attained without the possibility of parole. After they have completed an appropriate punishment for their significant crimes, these young people should have the

opportunity to prove that they deserve a second chance before their whole lives have been wasted in prison.

Amici value forgiveness and advocate for the juvenile justice system to recognize this value. The following testimonials demonstrate how individual victims came to forgive. Equally importantly, the accounts below show the significant role that forgiveness played in helping them overcome these tragic events and in recognizing that life without parole is an inappropriate sentence for children.

II. THE EXPERIENCES OF *AMICI* SHOW THAT JUVENILE LIFE WITHOUT PAROLE FAILS TO APPROPRIATELY REFLECT PROPORTIONALITY, REHABILITATION AND FORGIVENESS.

The specific accounts below show why *amici* hold such firm beliefs. These real-life experiences should form the backdrop for this Court's evaluation of how the principles of proportionality, rehabilitation and forgiveness bear on the constitutionality of juvenile life without parole. It is the high regard in which *amici* and other similarly-situated victims hold these related principles that has led them to advocate for an end to life without parole for juveniles.

A. Aqeela Sherrills knows firsthand that change is possible, and he believes that even his firstborn son's killer deserves a chance to change.

A few short months after his son's death, while on the set of the television show "America's Most Wanted," Aqeela shocked the detective working his case. Aqeela told him that he did not want Terrell's teenaged killer, if caught, to spend the rest of his life in prison. The detective was incredulous. "Like many others, he just didn't understand how I could not want this kid to go away for life." Aqeela did not relent, though, and even as he pled for the killer – a 17-year-old gang member – to turn himself in to authorities, he reiterated to the police, to family and to friends that his primary concern was in getting the killer the help that he needed to heal.

Even before Terrell's death, Aqeela had been opposed to life without parole for juveniles. Coming of age in the Watts neighborhood of south-central Los Angeles, he began working to end gang conflict as a young man. A one-time gang member himself, Aqeela made a discovery during his first year in college that would lead him to dedicate his life to violence prevention and the promotion of community and healing. Aqeela realized, "that my friends and I had been living under conditions that had been supported by a set of unwritten rules. Most of us hadn't really understood what we were doing, and we didn't understand how these 'rules' had impacted our lives. We were just following them because if we didn't, there would be consequences." These "rules" – rules about loyalty, love and revenge – often predetermined the results of even the smallest conflict.

The unfortunate result, Aqeela observed, was that much of the violence that plagued his neighborhood resulted from "knee-jerk reactions which, themselves, resulted from the immaturity of the people involved in the conflict."

Early in his life, Aqeela came to realize that the majority of those "rules"-driven conflicts were eminently preventable. Usually, the underlying causes of the conflict were not, in fact, interpersonal problems between the perpetrator and the victim. "Most of the conflicts that I dealt with during my 16 years on the front lines had to do with peoples' deeper wounds, many of which had been inflicted by sexual, physical or psychological abuse. These wounds had been left untreated because it was taboo to talk about them." The real problem, as Aqeela sees it, is that people, especially children, have been deeply wounded – mentally, emotionally or otherwise – early in their lives. The "rules" that govern life in what Aqeela calls the "relentless" streets of Watts and other neighborhoods across the country have foreclosed the possibility of treating those wounds. Young people carry the burden of that hurt yet simultaneously lack life experience and coping skills. When they enter into even the smallest conflict situation, the conflict quickly spirals to a point where adherence to the "rules" often leads to violence and bloodshed. For Aqeela, the only way to confront the juvenile criminal activity is to focus on healing the wounds and changing people's attitudes about adherence to those "rules" that do nothing but harm them.

Aqeela knows that such changes can be accomplished. His actions and experience give credibility to this belief. Specifically, Aqeela was the driving force behind brokering a 1992 peace treaty between the Los Angeles Bloods and Crips street gangs. From this and other similar experiences, and from the discoveries he has made about himself and his community, Aqeela knows that people, especially juveniles, are "basically good" and able to redeem themselves. Life imprisonment of juveniles who commit even the most heinous of crimes is not the answer because it fails to recognize that many offenders commit their acts because of their own wounds and adherence to a set of false "rules." Those wounds could be healed and juvenile offenders can learn that these "rules" make no sense.

Aqeela had hoped that he would never be faced with as close a personal challenge to his beliefs about juvenile sentencing as he faced on January 10, 2004. Around 11:45 p.m., Aqeela received a phone call from his son Terrell's close friend who told him that Terrell had been shot while attending a party in an affluent neighborhood. When Aqeela arrived at the hospital, a doctor explained that, despite his best efforts, Terrell had died of the gunshot wounds. Aqeela recalls feeling "totally defeated. That's the only way to describe it." He could not understand why someone would have wanted to shoot Terrell, his dynamic, charismatic, firstborn son. The circumstances of the shooting were frustratingly inexplicable: Terrell had been talking with his friends when the 17-year-old killer shot Terrell in the back multiple times. Looking back, Aqeela wishes that the killer had stopped to consider his actions even for a moment and had spoken with Terrell. The killer "would have gotten an entirely different read on my son."

In the midst of his suffering, Aqeela was confronted by numerous friends and family members who wanted to seek revenge. Terrell's killer had been quickly identified through the street network, and friends and family assured Aqeela revenge would be swift and precise. Aqeela stood his ground, not only demanding that the juvenile killer not be harmed, but also telling the detective on the case that he did not want the killer to go to jail for the rest of his life. Rather, Aqeela wanted to meet the killer and his parents. He wanted to know what had gone wrong and what wounds the killer carried. Most of all, he wanted to be sure the killer received appropriate care while carrying out his sentence.

Aqeela had spent his adult life seeking an end to conflict and promoting healing. He knew seeking revenge was "required" under the unwritten "rules," but, in seeking revenge, he would be sacrificing all that he and his community had achieved through his anti-violence work. The same, Aqeela believed, would be true if the killer was sent to prison for the rest of his life. "I recognized that the community could not afford to lose another child. It is imperative that we give people, especially children, a second chance and the opportunity to redeem themselves."

To Aqeela, imprisoning the 17-year-old for the rest of his life was an unjust punishment for someone who was likely failed by the people entrusted with his care: "when children commit a crime, it is a sign that parents have failed." Aqeela recognized that his son's killer, while having committed a heinous crime, was still a person who could contribute positively to his community. He wants the killer to be given the opportunity he needs to

heal his wounds and to recognize that the "rules" that he had followed no longer control his actions. For Aqeela, it is clear that his son's teenaged killer can be forever changed if he can recognize that his action likely resulted from an immature inability to deal with his own problems and a knee-jerk adherence to the "rules."

Aqeela does not feel that he holds these beliefs alone: "Terrell speaks through me against life imprisonment for juveniles."

B. Robert Hoelscher is tough on crime yet finds it inconceivable to sentence juveniles like adults for crimes committed under the misguided influence of youth.

In April 1961, when Robert Hoelscher was seven, his father was murdered by a troubled 17-year-old from his neighborhood in Houston, Texas. Robert's mother found her husband's body on the floor of the convenience store that Robert's father managed. Robert's father had partially lost his hearing while serving in World War II, so he never heard his assailant coming. He was shot in the back. The teenage killer was quickly apprehended with the murder weapon and the money he had stolen. He was tried and sentenced to life in prison. He remains in prison today, nearly 50 years later.

Robert and his five brothers and sisters were left without a father and, in many ways, the trauma that their mother experienced took her from them, too. Robert's mother spent the majority of her remaining

days struggling with addiction to nicotine, alcohol and pain killers. She died of cancer at age 57. As the middle child of six, Robert was the prototypical "lost child" of an alcoholic parent. He retreated into a withdrawn, quiet, and contented persona to cope with his difficult home life. Robert's family never discussed his father's death or their feelings about the event. It was not until well into adulthood that Robert found himself retelling the story time and time again to support a cause he came to champion.

Robert has spent a decade working in the criminal justice system and with juveniles specifically. His work began in 2001 as a volunteer for the Innocence Project of New Orleans. In only one year, Robert's hard work and dedication earned him a promotion to be the organization's first executive director. Although it is no longer his full-time job, Robert has never stopped his innocence work. He remains deeply connected to efforts to reform criminal justice in this country and continues to volunteer. Robert recognizes that his work experience may even eclipse his father's death in terms of the impact on his views on justice.

His innocence work notwithstanding, Robert has never considered himself an activist. He credits his initial attraction to this cause to the book *Actual Innocence* by Barry Scheck, Peter Neufeld and Jim Dwyer. The universal experience of a child wrongly accused of even a non-violent act resonated with Robert and helped him connect to the impetus behind the Innocence Project. He invested himself in criminal

justice reform, believing his connection to the cause had little to do with his father's death or the teenager who killed his father, and more to do with empathy and logic. Robert does not base his opposition to life sentences for children on an emotional response to a tragic personal event. Robert's views on juvenile life without parole, the death penalty and the need for an enlightened criminal sentencing paradigm for youth rests on pragmatism.

It was only several years later that a more personal motivation emerged. On a visit to one of his sisters, Robert came across a newspaper account of his father's murder. The article described a phone call his mother had made to the parents of her husband's killer. Only two days after her husband's murder, Robert's mother made the call to express her forgiveness and the sadness she felt for their son as a fellow parent. She told them that hate simply would not bring back the father of her children, so she had chosen to forgive. This news reflected a side of Robert's mother that had been lost to him in her later life.

Robert was deeply moved when he read about his mother's commitment to forgiveness in the immediate aftermath of unspeakable tragedy. The story reminded Robert that in these cases there is always loss on both sides. He felt his mother's gesture had to have afforded some healing to the parents of his father's killer. In some way, reading this story also provided Robert some sense of closure. "If there is any real life experience that can be called 'closure,' reading about my mother's phone

call was it for me." It was an emotional confirmation of the logic of the path he had taken.

To Robert, that logic is quite simple and compelling. As to the role of punishment, Robert says very matter-of-factly: "My father's killer took a human life. He needed to be held accountable. He was." As to the public safety concern, he says: "My father's killer could have taken someone else's life. He needed to be put in a place where he was no longer a threat to anyone else. He was." In terms of redemption, Robert is equally practical and straightforward. "When a person makes a mistake, he deserves a chance to make up for that mistake. If a prisoner can demonstrate that he is ready to go home and play by the rules, then we should provide that opportunity." Further, from a fiscal responsibility standpoint, Robert sees little sense in keeping someone in prison for life when the person could be contributing to society and paying tax dollars instead of spending them.

Self-described as "tough on crime," Robert's sense of logic compels his position "that juvenile life without parole offenders should have a path – hard earned to be sure – back to the community." He believes simply that juveniles are different from adults. He finds it unreasoned and peculiar that the criminal justice system seems to assume that a higher sentence for a juvenile who commits a more serious crime is appropriate because the more serious crime reflects a higher, rather than lower, level of maturity and accountability. "By any reasonable measure," he thinks, "that is wrongheaded logic. If anyone imprisoned for life deserves a second

chance at life, it is those individuals whose criminal acts were committed under the misguided influence of youth."

C. Tammi Smith feels her half-brother's killer has shown he deserves a second chance.

Tammi Smith grew up in the same dysfunctional household in Grand Rapids, Michigan, as her half-brother, Robert Sellon, whom she always thought of as her full brother. When Tammi was not quite 15-years-old, Tammi's mother threw Tammi, Robert and their other siblings out of the house. They all went in separate directions. Robert was already spending most of his time managing a local pool hall, so that simply became his residence.

On the night of October, 26, 1981, two 17-year-old brothers, David and Michael Samel, went to the pool hall where Robert lived. They had heard a drug shipment was being stored there. Since both brothers suffered drug addiction and were in desperate need of money, they headed to the pool hall intending to steal the shipment. However, the information they had received was wrong. Once they realized that there were no drugs at the pool hall, they decided to rob Robert. He put up a fight, and the two brothers beat him to death. At his trial, Michael pled guilty to second degree murder and received a prison sentence. David's counsel believed that, because Michael had pled guilty, David's case would be dismissed. However, his case not only proceeded to trial on first degree murder, but also resulted in a sentence of life in prison without parole for David.

Initially, Tammi was enraged by what these boys had done to Robert, and she hoped that the Samels would be imprisoned for the rest of their lives for their crime. She had recurring nightmares about the attack, and prior to David being transferred from pre-trial detention to permanent incarceration, Tammi visited him only to express her hatred of him face-to-face. However, this opportunity to express her anger to the offender did not provide her with the closure she desired.

As the years went on, Tammi looked to her Christian faith to help her work through her anger, and she eventually forgave the Samels for their crime. Yet even after embracing forgiveness, there was still an unresolved question that prevented her from achieving closure: What kind of adults had Michael and David become in prison? The question haunted her. In 2001, when she realized that Michael would soon be released from prison, she and her half-sister started corresponding with both Samels brothers and were able to visit them in prison. As she learned more about them, she saw that they were no longer drug-addicted, naïve teenagers, but mature adult men who felt extreme remorse over the crime committed in their youth. "David has talked about how childish he was, and he will beat himself up over it," she says. David has even expressed to her "that if he could give his life to bring her half-brother back, he would."

Michael has now been released, but David remains in prison. Tammi favors and will help to seek David's release. Tammi says that "he would be a better person out than wasting his life just sitting in prison – he could give something back."

Tammi Smith not only is seeking David's release but also opposes all juvenile life without parole: "It is just not right to put a teenager in prison for the rest of their lives thinking they are never going to change." Her own childhood experience plays a significant role in her views on sentencing juveniles to life in prison without the possibility of parole. She explains that as a youth, "there were a lot of things I did wrong in my life, but I would not want to have a mark against me for the rest of my life." She views David Samel similarly, saying he is not the same person now as he was as a teenager, and that he should not continue to be punished for the mistakes of his youth. It is clear to her that David would never commit a similar crime again.

Rather than focusing only on her own suffering, Tammi holds herself responsible to uphold the principles Robert would have had. Release is what Tammi believes Robert would have wanted. In getting to know the brothers, Tammi has often thought, "my brother would probably get along with these guys." She also knows that Robert, who himself committed minor crimes as a juvenile, including dealing drugs, would want someone like David to have a second chance. "He would have said, 'I deserve a second chance if I am the one in prison,' so David does too."

Tammi feels society is better served by releasing juveniles who have sufficiently demonstrated remorse for their crimes and who have applied themselves during their time in prison. She is inspired by David's commitment to using his time in prison to educate himself. She is gratified to hear David say that, should he ever be released, he wants to help juveniles who have

been convicted of crimes. "David wants to show he is sorry by giving back. He has a good heart and wants to help people." For Tammi, the thought that David will never have the opportunity to be a productive member of society is tragic, especially when there are other criminals who serve shorter sentences and never demonstrate the remorse and positive growth David has.

Unfortunately, Tammi knows that, for now, David's dream of re-entering society and using all he has learned during his time in prison to help others is not a reality. Instead, 27 years after being convicted for killing Robert, David is still confined to prison and faces the possibility that he will continue to pay for his crime until he dies in prison.

D. Linda White does not believe life sentences without the possibility of parole serve anyone.

Linda White had not given significant thought to the appropriateness of sentencing children to life without parole prior to November 18, 1986. That was the day that her 26-year-old daughter Cathy, then two months pregnant, was raped and killed by two 15-year-old boys.

Cathy was approached by her killers at a gas station and yielded to the boys' seemingly innocent request for a ride. Once inside Cathy's car, the boys brandished a stolen handgun, forced Cathy to drive toward Alvin, Texas, and then ordered her to stop just south of Houston, where they raped her. Drunk and high, the boys then shot Cathy in the leg with the intent to debilitate her. When they came to the sudden realization

that Cathy could identify them, they killed her and drove away from the scene in her car. Linda and her family did not learn of Cathy's fate until four days after her disappearance and murder. The killers were arrested and confessed to the police. They pled guilty to Cathy's murder and rape and received 54 and 55 years in prison, respectively.

Though the entry of the pleas gave Linda what she would later call "judicial closure," the long sentences meted out to the two boys did nothing to assuage the sadness that she felt. Nor did the pro-prison rhetoric she heard at her victims' support group provide any relief. Linda was only able to begin to come to terms with the horrific incident that had claimed Cathy's life when she began to confront "reality" about what had happened to her daughter and, significantly, to her daughter's killers.

Linda began to find this "reality" three years after Cathy's death. She enrolled in college-level courses and closely followed debates about the appropriate judicial response to criminal activity. She later learned about restorative justice, wanting to find and implement constructive solutions to the events that had torn her world apart. She went on to work with and teach inmates in Texas prisons. She has been heavily involved with the *Bridges to Life* program, offering victims and inmates the chance to gather and share stories in a supportive, healing-based environment. These thirteen years spent working in prisons and learning about criminal justice have given Linda the perspective that has allowed her to better cope with Cathy's death. Linda has come to know that prisons are horrible places, and

that sentencing anyone to spend their life in such an environment – without giving them an opportunity to make up for past wrongdoing – is an unusually cruel and pointless response to crime.

Linda does not believe that sentencing juveniles to life without parole is ever appropriate, no matter how serious their crimes may have been. "There is no way that a 13- year-old can be held responsible to make decisions the same as adults do." Linda's coursework in psychology has taught her that only adults have sufficient understanding of their actions and a developed ability to resist impulses. As with the boys who made a snap decision to murder her daughter, "juveniles aren't able to fully appreciate the long-term consequences of their actions."

Linda's experiences working directly with inmates much like the boys who killed Cathy have given her the opportunity to see firsthand the impact of the oppressive conditions imposed by a life without parole sentence. This experience has strengthened Linda's opposition to the sentence. Many of the inmates she has met have expressed remorse for their wrongdoing. They are focused on trying "to make up for the wrong they've done." Sentencing juveniles to life without parole deprives them of the opportunity to return to the world and "make up" for their wrongs.

Linda has come to terms with her daughter's rape and death not through seeking retribution, but through advocating for a more just solution that she knows serves her daughter, her daughter's killers and the country as a whole. "There is already enough pain and

violence in the world," Linda states. The infliction of additional violence upon others, especially juveniles, does not make sense to her. Linda knows that Cathy would not have wanted to see her killers locked away for the rest of their lives without the possibility of release. When Linda first had an opportunity to talk with one of her daughter's killers, she learned, for the first time, what her daughter's last words to them had been: "I forgive you, and God will, too." Of her advocacy of justice, Linda says, "Cathy would love what I am doing."

E. Ruth Johnson does not believe the punishment fits the crime for the 17-year-old killer of her son.

On December 7, 1987, just before his 23rd birthday, Ruth Johnson's son Steven was shot and killed by a 17-year-old drug dealer. Steven was sitting in a car next to his girlfriend unaware that their backseat passenger was armed. Without warning, the teenaged passenger opened fire on Steven and his girlfriend, shooting them multiple times. When the police arrived, Steven and his girlfriend were both found dead and the killer had fled the scene.

Ruth was shocked and devastated. She attended court hearings and the trial where the 17-year-old was found guilty of two counts of murder and one count of possessing a weapon. The teenager received a life sentence without parole. Following that final hearing, the case was closed – at least for purposes of the criminal justice system. For Ruth, neither the trial nor the sentencing stopped her pain.

Today, the teenager is a grown man and a life prisoner. Lynn McNeal has served 20 years of his sentence, yet Ruth's emotional wound remains open. Lynn turns 39 this year and is still the only person who has been arrested or taken any responsibility for Steven's death. An adult supplied him the bullets and adults ran the drug operation that led to the murders. Only Lynn ever went to prison.

Ruth does not doubt Lynn's culpability. She questions his sentence. Though Ruth was sitting in the courtroom during the short bench trial, she describes herself as having been "frozen" – unable to feel or listen to anything that was happening around her. She did not follow the trial or the legal arguments, and she barely noticed the teenager before her who was being sent away for life.

Twenty years later, Ruth reviewed the trial transcripts from this dark period and found herself unhappy with the process that led not only to a teenaged boy being held solely responsible for the crime against her son but also, and more importantly, to his being given such an unjust sentence. She learned that Lynn had been alone in a police station all night before he confessed without a parent or attorney to advise him. Ruth fears that he may only have confessed because he believed the police when they promised leniency because of his age. Although Ruth knows that the boy deserved a significant sanction for his crime, Lynn's continued imprisonment serves neither Ruth nor her community.

Ruth does not think the punishment fits the crime. For her, life without parole is not the right sentence for

a young member of a criminal business that buys and sells narcotics and eliminates anyone who gets in its way. It does not do justice to her son that the others in the drug ring were never questioned or arrested – nor does it serve her son or provide justice for her family when the teenage offender continues to serve a sentence decades after his mistake and will not ever be given the chance to make up for his crime outside of prison.

F. Azim Khamisa is working together with the family of his son's killer to curb youth violence and help their communities heal.

Azim Khamisa first confronted the issue of sentencing juveniles to life in prison without parole when his 20-year-old son Tariq, was shot dead by a gang member while delivering pizzas in San Diego on January 21, 1995.

Fourteen-year-old Tony Hicks shot Tariq on orders from a gang leader who was himself only 18. At the time, Tony was taking part in an initiation ritual where he and his fellow gang members ordered a pizza with the plan to steal the delivery man's cash when he arrived at the door. Tariq was the delivery man. When Tariq refused to turn over his money to the gang members, he was fatally shot by Tony. Five days later, Tony Hicks was arrested and ultimately prosecuted. He received a sentence of 25 years to life in prison.

On the news of his son's death, Azim's life "came to a crashing halt." He even felt suicidal. After taking nine months to begin to come to terms with his son's death, Azim set up the Tariq Khamisa Foundation ("TKF") and

approached someone who might seem to be an unlikely partner in this effort: Tony's grandfather, Ples Felix. Azim offered forgiveness and invited Tony's grandfather to work together to help put an end to youth violence. Through their joint efforts, TKF began to deliver youth education programs to prevent gang violence and murder.

It still took Azim five years to develop the courage to come face-to-face with his son's killer. When he looked into Tony's eyes during their first meeting, instead of feeling anger and revenge, Azim recognized Tony's humanity. Azim found himself looking into the eyes of a young boy, not a killer.

Azim realized that Tariq was not the only victim in this incident. Victims lay at "both ends of the gun." While his son was the victim of a killer, the killer himself was a victim of society. Tony was born to a 15-year-old single mother and was rejected by his father. At an early age, Tony witnessed the death of his cousin and suffered abuse from his uncle's girlfriend. He was then sent to live with a relative.

Azim is in regular contact with Tony in prison. Azim realizes that young offenders can be reformed and has been working to reduce Tony's sentence. Tony is studying in jail and has now passed his college exams. Azim has offered Tony a job in his foundation should he ever be released. Azim believes Tony will be more useful to society by working for TKF than by spending his life in prison.

Despite having a demanding job, Azim dedicates virtually all of his remaining time to TKF and other projects, such as The Forgiveness Project and the Constant and Never Ending Improvement Program ("CANEI"), all of which work towards restorative justice for young people. Azim has worked with these organizations for 15 years. Azim has also published several books in this area, including *From Murder to Forgiveness*, *From Forgiveness to Fulfillment* and *The Secrets of a Bulletproof Spirit*. He has spoken globally on these issues and has won various international awards in this area, including the California Peace Prize by the California Wellness Foundation, the National Crime Victims Special Community Service Award presented by President Bill Clinton and Attorney General Janet Reno, and the Season for Nonviolence Peace Hero Award. Although he had to pay a high price, Azim feels that he now leads a fulfilling life.

Through his hard work and dedication to this cause, Azim has realized the benefits of such restorative programs for juveniles. He believes that almost all juvenile offenders can be rehabilitated and integrated peacefully back into society. Young people make mistakes, but that does not make them unforgivable.

G. Bill Pelke believes all juveniles, including his grandmother's killer, can be turned around.

On May 14, 1985, Bill Pelke's grandmother was killed by a group of four teenaged girls. Everyone in Ruth Pelke's Gary, Indiana neighborhood knew that the elderly woman freely gave Bible lessons to local children who were interested. Tragically, this generosity led four

drunk and high teenagers to knock on her door pretending to want Bible lessons when they really wanted to steal money for video games. Ruth was an easy target. When she unsuspectingly turned to get them information for the lessons, one girl hit her over the head with a vase. Then, Paula Cooper, just 15 years old, stabbed Ruth 33 times. The teens managed to steal only 10 dollars and Ruth's car.

Paula was sentenced to death and initially placed on death row. Angry and frustrated, Bill supported the sentence and favored the media attention and publicity that it would bring in exposing the circumstances of his grandmother's death.

A year-and-a-half after Ruth's death, and three-and-a-half months after Paula was sentenced, Bill realized the death penalty was not, in fact, the most appropriate punishment for the killer of a spiritual woman with a tremendous faith in the Bible. Understanding that the death of any child would have deeply hurt his grandmother, Bill felt that the responsibility rested on his shoulders to seek justice in the way that his grandmother would approve.

This sense of responsibility led Bill to an help in an effort to collect signatures from two million people to overturn Paula's sentence. After three years, her sentence was reduced to 60 years, or 30 years with good behavior. During this time, Bill regularly exchanged letters with Paula. However, his first face-to-face meeting with Paula did not come until nine-and-a-half years after his grandmother's death, on Thanksgiving in 1994. In this meeting Bill was able to face the killer

and feel forgiveness instead of hate and anger. The key to Bill's forgiveness was his ability to feel compassion because he saw that Paula had the ability to reform. He continues to correspond with her today.

Bill is now convinced that Paula has reformed. She has obtained her GED and a college degree. She wants to help others who shared her experiences. Observing Paula's rehabilitation, Bill feels all juveniles can be turned around if given the right chance and environment. This provides him a sense of healing.

Today, Bill is president of Journey of Hope, an organization he co-founded with families of murder victims who oppose the death penalty. Bill is also the author of "Journey of Hope," has been featured in several publications, and speaks in a variety of forums on his experience. Bill witnessed Paula's successful rehabilitation in prison and sees it as proof that all juvenile offenders deserve the possibility of parole.

H. Ninety-eight mothers of murder victims comprise *Mothers Against Murderers Association*, a non-profit organization created to serve victims who seek resolution and forgiveness as well as justice.

At 6:30 p.m. every other Thursday night, mothers hold hands in West Palm Beach Florida and pray for themselves, for their families and for their murdered children. The non-profit organization Mothers Against Murderers Association ("MAMA") brings these women together and opens the floor to any of the 98 members who wish to voice an opinion or share a story. Some will talk about their day. Others may talk about children's

problems at school. And some will share thoughts about the murder of their loved ones, how they are healing, and whether they have found the strength to forgive. The healing circle is a spiritual experience in which MAMA members acknowledge the pain and anguish of losing a loved one and, over time, seek to forgive the murderer.

Angela Williams, MAMA's founder, has lost seven family members to murder. Her desire to cope with those murders – and to help other like her heal and survive these tragic events – inspired Angela to found MAMA in 2003. The organization's primary aim is to assist parents and guardians of murder victims. Many of them have had their lives forever altered by juvenile killers.

On March 20, 2001 Angela's 18-year-old nephew, Dtaurean Gidds, was murdered by 17-year-old Rogyne O'Neal during an attempted robbery. Dtaurean had been talking with his cousin when he was approached by two teenaged robbers. When Dtaurean revealed that he knew one of the robbers, Rogyne was startled. Afraid of being turned in, Rogyne fatally shot Dtaurean. Rogyne was arrested later that year. After his trial, he was sentenced to serve two life sentences.

As she has with all seven murderers responsible for the deaths in her family, Angela has come to forgive Rogyne. Angela understands the importance of forgiveness. She has had multiple experiences counseling other victims' family members who, unable to forgive, allowed anger to build up inside of them and developed obsessions with revenge. Angela has seen how

these people become trapped in their rage, unable to move beyond the tragedy and constantly reliving the pain of their loss. In her experience, too much focus on punishment of offenders – rather than on seeking justice for all involved through rehabilitation – worsens the situations. This is especially true in situations where the offenders are juveniles. As Angela explains, children – even those who commit the worst crimes – can and must be saved. For her, healing for victims' families and redemption of juvenile offenders are essential and synergistic: victims cannot heal unless child offenders are given a true chance at rehabilitation.

Led by Angela's example, MAMA's members stand against juvenile life sentences without parole. They believe that juvenile offenders can be redeemed and can transform their lives. MAMA members find juvenile life without parole sentences unacceptable because such sentences reject the possibility of restorative justice and deny juveniles a chance at redemption. Angela summarizes MAMA's ethos saying, "We're about forgiveness and we're about saving the children." For many of MAMA's members, that forgiveness takes on true meaning when they engage in helping another child – even if that child is the killer of their own son or daughter. MAMA members recognize that "My child won't come back so why shouldn't I help this child have a second chance?" Angela says, of MAMA members, "We can't help our kids anymore but we can help someone else's."

MAMA's focus is not only on forgiveness but finality. Finality does not result from a correctional institution that forecloses parole review for a juvenile offender. For

MAMA, finality is accomplished only when a juvenile offender has changed direction through rehabilitation and has become a contributing member of the community. Finality comes when a child has been rehabilitated and is released from prison. It is this sense of finality that leads to true "closure." Angela explains: "You only reach finality by helping someone else. Not just take, take, take. You have to give back."

MAMA gives back by counseling and guiding children who begin to display criminal tendencies. The organization has developed an educational component that encourages members to share their own experiences of loss with jailed juvenile offenders. MAMA volunteers teach the children how to consider the consequences of their actions and contribute to, rather than endanger, their communities. MAMA members know that many juvenile offenders come from at-risk communities and families. Even these children are still in their formative years and can overcome this disadvantaged beginning. But they need help. As Angela reiterates over and over, "You have to save the children. That's what the focus is on, saving the kids."

Tangenika Williams, another MAMA member, agrees that juvenile offenders deserve a second chance. She believes that the still-unidentified killer who claimed her husband's life in a June 25, 2005 drive-by shooting should "do the time for the crime." But she also believes that if the killer was a juvenile – as she suspects – the killer deserves a "second chance at life." She recognizes that juveniles' "brains aren't like adults" and that juveniles are more susceptible to snap decisions resulting from, among other things, peer pressure. Most

important for Tangenika is that the killer, if a juvenile, is given a real opportunity at reformation and rehabilitation. She believes that children should be punished differently than adults: "children need guidance, not a life spent in the penitentiary."

Tangenika, Angela and other MAMA members continue to bring their message of forgiveness and healing to others in the community. MAMA provides family members comfort, often beginning just hours after a murder victim has been found and even at the crime scenes. They counsel grieving parents and try to talk down angry family members who cannot see past their rage and only want revenge. The experience of these crime victim mothers has taught them that it takes a tremendous commitment to help family members of victims. MAMA strives to provide a vital source of continuing support and healing, something which may otherwise be unavailable. MAMA also works actively with both the police and the community to encourage witnesses to help solve murders. MAMA is dedicated to providing a variety of programs for children aimed at helping them cope with loss and turning them away from violence. MAMA's extensive advocacy and activism has given it a unique perspective on and stake in juvenile justice issues.

Angela and other members of MAMA have long recognized that kids "make bad judgments, do bad things; they're not really realizing what they're doing. They're not taught the right things." MAMA members believe that juvenile offenders, still in their formative years of development, have the chance to change only if someone will reach out them. MAMA aims to help the

community fill that role and opposes juvenile life without parole because it is antithetical to their goal: to give both victims and juvenile offenders "a chance at life again."

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It may be contrary to our assumptions that victims of violent crime would be as forgiving as the victims who constitute *amici* here. But the rationale for their opinions is supported by the sometimes emotional, sometimes spiritual and always personal journey they have traveled. For *amici*, this journey has led them to a place where they advocate to see the juvenile killers of their family members freed after they have paid the price for their crimes and shown that they have been rehabilitated. In their own ways, each account reveals a recognition that proportionality in sentencing is essential and that locking a child away forever for a crime committed before that child was fully developed and accountable is inconsistent with the principle of proportionality. Each account reflects the significant impact of successful rehabilitation on the healing of the victim's family and the way that this process of rehabilitation engenders a parallel process of forgiveness in so many victims.

Amici reject juvenile life without parole for the ultimate crime of murder. Their experiences should inform this Court's view of whether such a cruel punishment is ever appropriate for children in non-murder cases. It is not. Juvenile life without parole is unconstitutional in large part because it fails to take into account that sentencing does not necessarily

become more just with permanence. It is only through a permanent focus on proportionality, rehabilitation and forgiveness that our system of sentencing of juveniles can be restorative and successful for victims, offenders and communities.

CONCLUSION

For the reason set forth above, *amici* respectfully request that this Court reverse the ruling of the court below.

Respectfully submitted,

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Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari to the District Court Of Appeal, First District, State Of Florida

BRIEF FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 29.6, amici NAACP Legal Defense and Educational Fund, Inc., Charles Hamilton Houston Institute for Race and Justice, and National Association of Criminal Defense Lawyers certify that each are non-profit corporations with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Challenges of Developing an Effective Attorney-Client Relationship with a Teenager 4

A. A Child's Tendency to Mistrust Adults Impedes the Development of a Proper Attorney-Client Relationship 7

B. Adolescents' Limited Comprehension of Core Legal Concepts, Institutional Actors, and the Adjudicatory Process Complicates the Development of an Effective Attorney-Client Relationship... 11

C. Adolescent Deficits in Judgment, Temporal Perspective and Susceptibility to Peer Influence Hamper Effective Representation of a Child Client..... 12

II. Compromised Attorney/Child-Client Relationships Hinder Defense Counsel's Ability To Conduct A Constitutionally Appropriate Factual Investigation..... 15

III. Compromised Attorney/Child-Client Relationships Can Yield Flawed Decisions to Accept or Reject Plea Bargains 19

IV. Compromised Attorney/Child-Client Relationships Can Contribute to Children Facing Inappropriately Harsh Prison Conditions 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans and others who are unable, on account of poverty, to employ legal counsel to secure their rights by the prosecution of lawsuits. LDF has a long-standing concern with the impact of racial discrimination on the criminal justice system. It has served as counsel of record and/or as *amicus curiae* in this Court in, *inter alia*, *Furman v. Georgia*, 408 U.S. 238 (1972), *McClesky v. Kemp*, 481 U.S. 279 (1987), *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973) and appeared as *amicus curiae* in *Roper v. Simmons*, 543 U.S. 551 (2005), *Kimbrough v. United States*, 552 U.S. 85 (2007), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators,

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and policymakers to focus on, among other things, reforming criminal justice policies.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is the promotion of the proper administration of justice.

SUMMARY OF ARGUMENT

Experience, science and this Court's precedents all recognize that children are fundamentally different than adults.[2] One of the most significant aspects

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[2] Since its inception, the juvenile justice system has countered the stark differences between youth and adults through "individual assessment and treatment" of children in an effort to reintegrate young offenders into society. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. Kan. L. Rev. 659, 667 (2005); *see also* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clin. Psych. 459, 462 (2009) ("[I]t is clear that the founders of the juvenile justice system

of this difference is that children who commit criminal offenses are less culpable than adults. *Roper v. Simmons*, 543 US. 563, 569-70 (2005). These principles bear directly on the constitutionality of juvenile life without parole sentences. Such sentences fail to comport with the requirements of the Eighth Amendment for the reasons raised by the Petitioners and supporting *amici* and because the unique characteristics of youth can critically undermine defense counsel's ability to effectively assist their teenaged clients, and the compromised attorney-client relationship contributes to an increased likelihood of unreliable sentencing outcomes that fail to reflect culpability and guilt. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). For these reasons, individuals younger than age 18 at the time of the offense should not be subject to life without parole sentences.

ARGUMENT

This brief explains how the characteristics of youth can interfere with the development of an effective attorney-client relationship and how the impaired relationship with counsel, in combination with the concerns raised by Petitioners and their

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began from the premise that adolescents are developmentally different from adults in ways that should affect our interpretation and assessment of their criminal acts."). This Court has appropriately addressed the developmental concerns of youth by affording children the rehabilitative benefits of the juvenile justice system and such procedural and substantive safeguards rooted in due process as the rights to counsel, confrontation, cross examination, proof beyond a reasonable doubt and freedom from compelled self-incrimination. *See In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

supporting *amici*, so undermine the reliability of life without parole sentences that such punishments are unconstitutionally disproportionate for children younger than age 18 at the time of the offense.

This Court has acknowledged that a child's immature judgment, impulsive decision-making and vulnerability to peer pressure reduce culpability such that the capital sentencing of offenders younger than age 18 violates the Eighth Amendment. *See Roper*, 543 U.S. at 569-70; *Thompson v. Oklahoma*, 487 U.S. 833, 834-35 (1988). These attributes, in addition to the dynamics of race, class and the nature of indigent defense, can also disadvantage a child's relationship with counsel and contribute to a significant risk of an unreliable sentencing outcome that fails to reflect actual culpability.[3] Given the severity and finality of a death-in-prison sentence, this Court should categorically exempt children from life without parole sentences.

I. The Challenges of Developing an Effective Attorney-Client Relationship with a Teenager.

A criminal defense attorney's ability to effectively represent her client and fairly subject the prosecu-

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[3] *See* Samuel Gross, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545, 548-51 and Table 6 (2005) (describing unreliable outcomes for children and adolescents in the criminal justice system and noting higher concentration of false confessions among adolescent as compared to adult exonerees); *see also* Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257 (2007) (discussing characteristics of children, juvenile, and criminal justice system that lead to wrongful convictions).

tion's case to "a reliable adversarial testing process," *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (citations omitted), is critically dependent on the existence of a trusting attorney-client relationship and the client's ability to assist counsel, guided by a meaningful understanding of the legal proceedings. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932) (stating that defendants need "the guiding hand of counsel at every step in the proceedings against [them]").[4]

This Court has acknowledged that children, as a class, "lack [ ] maturity and [possess] an underdeveloped sense of responsibility [that] often result[s] in impetuous and ill-considered actions and decisions," are "vulnerable and susceptible to negative influences and outside pressures," and have a "transitory, less fixed" personality. *Roper*, 543 U.S. at 569 (citations omitted). Experts consistently concur with this Court's assessment and note that each of these youthful qualities, which are rooted in the neurological differences between adults and children,[5] can

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[4] *See also Morris v. Slappy*, 461 U.S. 1, 21 n.4 (1983) (citing A.B.A. Standards for Criminal Justice, commentary to § 4.29 (2d ed. 1980)) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."); *Gault*, 387 U.S. at 36 (1967) (determining that a child "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it"); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (describing the right to counsel as "fundamental and essential to fair trials").

[5] These unique characteristics of adolescent children are a direct product of the neurological development of the brains prior to adulthood. The frontal lobe of the brain, which "man-

and often do impede a child's judgment, decision-making, and ability to develop the trust, confidence and open communication necessary for an effective attorney-client relationship. *See* Steinberg, *supra* note 2, at 468-71; Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 Fam. Ct. Rev. 466, 474 (2007).

Many characteristics of youth complicate the development of a proper attorney-client relationship. As detailed below, a teenager's tendency to distrust adults, limited understanding of the criminal justice system and the role of the defense lawyer within it, deficits in judgment, and considerations of race and class combine to inhibit the development of an effective attorney/child-client relationship and further demonstrate how juvenile life without parole sentences cannot be reconciled with the Eighth Amendment.

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ages impulse control, long-term planning, priority setting, calibration of risk and reward and insight [,] is still growing and changing during adolescence and beyond . . . ." Abbe Smith, *"I Ain't Takin No Plea": The Challenges in Counseling Young People Facing Serious Time*, 60 Rutgers L. Rev. 11, 20 (2007); *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 816 (2003) (discussing the connection between brain development, judgment, and decision-making). "[T]asks involving planning, self control, inhibiting impulsive actions, learning from experience, social judgment, and weighing rewards and risks in decision-making situations" may not reach full development "until adolescents reach their twenties." Clarke, *supra* note 2, at 710.

A. A Child's Tendency to Mistrust Adults Impedes the Development of a Proper Attorney-Client Relationship.

The well-known failure of adolescents to relate to and trust adults and authority figures presents a fundamental impediment to the candid communication necessary for an effective attorney-client relationship. *See* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997) (explaining that this mistrust may be the product of the natural adolescent stage of a child working through "developmental issues of independence and identity" or from previous experiences with adult authority figures). A child's process of "establishing autonomy from . . . parents" can manifest itself in a "rebellion against parental values . . . until late adolescence or early adulthood." Clarke, *supra* note 2, at 697 (footnotes omitted); *see also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 156 (1997) ((citing Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674 (1993)) noting that "adolescents are striving for elusive autonomy from parental and adult authority in a context in which most privileges of adult status are withheld"). As a result of this process, adolescents are notoriously "reluctant to participate in conversation with adults or answer their questions . . . ." Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates*, 40 Colum. J. L. & Soc. Probs. 551, 566 (2007).

This adolescent aversion is likely to affect the attorney-client relationship because "lawyers are not familiar figures in children's lives, unlike teachers, doctors, and nurses. . . . [Y]outh are more likely than adults to refuse to speak with their attorney, thereby inhibiting the effectiveness of the representation." *Id.* at 566-67 (footnotes omitted). As a result, children are more likely to distrust counsel and are less likely to engage in the type of communication required for an effective relationship with an attorney.

Trust barriers may also be exacerbated by the cross-racial nature of many attorney/child-client relationships.[6] African-American children are overrepresented[7] among those subjected to life-without- -

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[6] *See* Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573, 596 (2008) (describing cross racial nature of representation for children).

[7] The overrepresentation of African-American children in the criminal justice system is a well documented subject of numerous respected studies. The United States Department of Justice, Office of Justice Programs noted that in 2004, minority youth comprised 70% of juveniles held in custody for violent offenses, and that black youth were twice as likely as white youth to be sentenced to prison. *See* U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juveniles in Corrections*, 9, 21 (June 2004). In 1999, DOJ found that "[m]ore than three-quarters of youth newly admitted to State prison were minorities." U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Minorities in the Juvenile Justice System*, 15 (Dec. 1999); *see also* Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to the Nation*, 3 (July 2009) (finding that in Florida, the state from which the two cases before this Court arise, 84% of the total population of children serving life without parole for non-homicide offenses are African American);

parole sentences,[8] and many factors—including the phenomenon of racial profiling and the negative impression of the criminal justice system that it naturally produces—are likely to breed significant mistrust of the criminal justice system and its actors, including defense attorneys, among African-

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Barry Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed*, 34 N. Ky. L. Rev. 189, 252 (2007) ("[F]orty-one of forty-two states found minority youths overrepresented in secure detention facilities and all thirteen states that analyzed institutional commitment decisions reported disproportionate minority confinement."); Michael Lindsay, *The Impact of Gault on the Representation of Minority Youth*, 44 No. 3 Crim. Law Bulletin 4 (2008) (African-American youth are in the juvenile justice system are "most consistently, and pervasively overrepresented across the United States."); Nat'l Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, 3, 34 (Jan. 2007) (finding that in 2002, three out of four adolescents who were newly admitted into adult prisons were youth of color, and "African American youth accounted for 58% of total admissions to adult prisons"); Kenneth Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 686-87 (2002) (discussing the racial disparities present in the juvenile justice system and disproportionate number of African-American youth arrested, detained, charged and sentenced); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement 2002 Update*, 2 (Sept. 2004) (examining data from 1990-1997 and describing African-American youth as overrepresented at all stages of the juvenile justice system compared with their proportion in the U.S. population).

[8] *See* Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008*, 39 (2008) (stating that nationwide, black teenagers are ten times more likely to receive life-without-parole sentences than their white counterparts and African Americans constitute 60% of youth serving life without parole sentences).

American youth.[9] *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 133-34 nn.9-10 (2000) (Stevens, J., concurring in part and dissenting in part) (noting the prevalence of racial profiling by law enforcement against citizens of color); *U.S. v. Leviner*, 31 F. Supp. 2d 23, 33 & n.26 (D. Mass. 1998) (describing the criminal history score of an African-American defendant as reflective of racial disparities that have grown out of racial profiling). This problem of distrust may also be enhanced among poor children who must rely on appointed counsel whose commitment to zealous advocacy the child may doubt. *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 136-37 (2000) (footnote omitted) (finding several respondents in the study to be "especially critical of public defenders, whom they believed feigned advocacy in an effort to manipulate them to accept pleas that were not in their best interests"); Puritz, *supra*, at 474 (citing studies "suggest[ing] that children are less likely to trust or communicate with attorneys whom they know are court-appointed").[10]

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[9] *See* Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 377 (1997) (discussing influence of cultural dynamics on attorney-client relationship); Puritz, *supra* at 472 ("Research indicates that African American children . . . are consistently less likely than their White counterparts to trust their defense attorneys.").

[10] As of 2007, African-American and Hispanic youth were nearly three times as likely to live in poverty as white youth. U.S. Dept. of Justice, *OJJDP Statistical Briefing Book* (2008), *available at http://ojjdp.ncjrs.gov/ojstatbb/population/qa0140.asp.qaDate=2007.*

Thus the trust necessary for an effective and collaborative relationship between attorney and client is often undermined by an adolescent defendant's age-based likelihood to distrust counsel.

B. Adolescents' Limited Comprehension of Core Legal Concepts, Institutional Actors, and the Adjudicatory Process Complicates the Development of an Effective Attorney-Client Relationship.

The attorney-client relationship and its critical requirement of confidentiality are difficult concepts that few children can fully understand. Children often assume that their lawyers are required to report the substance of their communications to the court or other authority figures, such as police officers or parents. Youth under age 19 often "incorrectly believe[ ] that [a defense] attorney was authorized to tell judges or police officers what was discussed in confidential attorney-defendant conversations." Grisso, *supra*, at 15 (citations omitted). Moreover, children "may develop a belief that all adults involved in the proceedings are allied against [them], perhaps after seeing defense attorneys and prosecutors chatting together outside the courtroom." Steinberg, *supra* note 2, at 475. Accordingly, "[m]any youths fail[ ] to differentiate the roles and functions of judges, prosecutors, and defense counsel, whom they perceived as one, and as adversarial." Bishop, *supra*, at 136.

These mistaken beliefs can have devastating consequences. "[A] child who is unpersuaded by his attorney's loyalty may simply withhold information from the attorney, depriving both the attorney and

the child of an opportunity to exchange important insights in the case." Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 273 (2006).

C. Adolescent Deficits in Judgment, Temporal Perspective and Susceptibility to Peer Influence Hamper Effective Representation of a Child Client.

A young client's immaturity in judgment and limited temporal perspective may frustrate the development of a viable relationship between counsel and client. *See* Feld, *supra* note 7, at 225 ("[G]eneric developmental limitations impair juveniles' ability to understand legal proceedings, make rational decisions, and assist counsel."); Henning, *supra*, at 272-73 (discussing influence of peers, temporal perspective and deficits in judgment on decision-making and relationship with counsel). "It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)). It is therefore not surprising that deficiencies in judgment can also prevent a child from fully considering all available adjudicative options and limit his or her ability to "assess or integrate long-term consequences into their analysis." Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 Temp. L. Rev. 357, 367 (2006). For example, an adolescent "engaging in a cost-benefit analysis [may] 'weigh the particular cost or benefit[s]'" of certain choices dif-

ferently from an adult who possesses the experience and temporal perspective to make well-reasoned choices. *Id.* at 368 (quoting Elizabeth S. Scott, et al. *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & Hum. Behav. 221, 233 (1995)). Similarly, an adolescent may "withhold information from his attorney in order to feel the immediate benefit of not fully incriminating himself, but fail to recognize the long-term costs of compromising his own defense . . . ." Henning, *supra*, at 273; *see also* Hughes, *supra*, at 565 (noting the difficulty children have in comprehending the role of a lawyer and the influence on information sharing caused by differences between children and adults in future orientation, cost-benefit analytical processes, and the child's focus on immediate gains).[11]

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[11] *See also* Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & Fam. Stud. 11, 53 (2007) (noting that adolescents "undersestimate the magnitude or probability of risks, use a shorter time-frame, and focus more on potential gains rather than losses" as compared to adults); Michael Pinard, *The Logistical and Ethical Difficulties*, 6 Nev. L. J. 1111, 1121 (2006) ("[S]tudies have found both that [children] do not understand the various phases of the criminal process and that they cannot fully comprehend long-term consequences (or tend to ignore these consequences in favor or immediate consequences) . . . ."); Scott, *Evolution*, *supra*, at 171 (noting that a youth's narrow temporal perspective, which leads to a focus on short-term rather than long-term consequences, limited concept of time and tendency to take risks can "influence judgments about the value of accepting plea bargains"); Steinberg, *supra* note 2, at 475 ("Immature youths may lack capacities to process information and exercise reason adequately in making trial decisions, especially when the options are complex and their consequences are far reaching."); Donna M. Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with*

The influential role that a teenager's peers may play in the decision-making process also has the potential to impede the development of a proper relationship between counsel and client. "Peer influence affects adolescent judgment both directly and indirectly." Steinberg, *supra* note 2, at 469. Adolescents may "make choices in response to direct peer pressure" or act in ways that relate to their "desire for peer approval and consequent fear of rejection . . . ." *Id.* As a result, judgments about collaboration and cooperation with authorities and counsel are sometimes made through the often illegitimate filter of a child's feelings about how decisions will inform and define their role among peers. *See* Cohen, *supra*, at 363-64 (discussing the influence of peers on adolescent decision-making); Henning, *supra*, at 273 (same); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 816 (2005) ("[S]ubstantial evidence supports that adolescents are more susceptible to peer influence than adults. . . . At least during the period of early- and mid- adolescence, decisions often are driven by acquiescence or opposition to authority or by efforts to gain peer approval (or avoid peer rejection)."); Cohen, *supra*, at 363 ("Susceptibility to peer influence appears to increase between childhood and early adolescence, peaks at about age fourteen, and then . . . decreases into early adulthood.").

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the Legal Rights Provided by In Re Gault, 60 Rutgers L. Rev. 125, 158-59 (2007) (explaining that "perceived difference between a sentence of five years and ten years is a lot less meaningful to a teen than to an adult").

Thus, an attorney's ability to develop a constitutionally effective relationship with a child client is often impaired by the characteristics of youth.

II. Compromised Attorney/Child-Client Relationships Hinder Defense Counsel's Ability To Conduct a Constitutionally Appropriate Factual Investigation.

As detailed above, the characteristics of youth can significantly complicate the development of a proper attorney-client relationship. An attorney's capacity to adequately investigate his child-client's case is directly affected by this compromised relationship.

The duty to investigate is a vital component of every defense attorney's constitutional obligation to his or her client. *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Wiggins v. Smith*, 539 U.S. 510, 522-27 (2003); *Strickland*, 466 U.S. at 690-91; *see also* A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-3.2(a) ("[D]efense counsel should seek to determine all relevant facts known to the accused . . . [a]s soon as practicable."). A lawyer's ability to conduct an adequate defense investigation is, in turn, dependent upon her ability to communicate with the client.

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may

> be considerably diminished or eliminated altogether. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691 (citation omitted); *see also* A.B.A. Standard for Criminal Justice: Prosecution & Def. Function, Standard 4-3.2, cmt. ("The client is usually the lawyer's primary source of information for an effective defense.").[12]

"A trusting client is far more likely to reveal facts and details that not only help in formulating the defense, but, in the absence of broad discovery rules, help the attorney learn more about the prosecution's case." Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 San Diego L. Rev. 525, 541-42 (2007) (citing *Morris*, 461 U.S. at 20-21). A lawyer-client relationship characterized by suspicion and mistrust will leave an attorney less likely to learn critical facts and less able to provide effective

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[12] *See also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (the attorney-client privilege was developed "to encourage full and frank communication between attorneys and their clients" in recognition of the fact "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity . . . of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

representation. Thus open communication is a necessary precursor to an adequate factual investigation and "is well recognized by the courts and ethical rules as 'the cornerstone of the adversary system.'" Hoeffel, *supra*, at 541-42 (quoting *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981)).

As described in Section I.A, *supra*, the communication needed to shape counsel's investigation can be significantly precluded by a teenager's natural mistrust of adults. A child may be unwilling to share relevant factual information regarding her case or refuse to speak with her attorney at all, thereby narrowing the scope and adequacy of counsel's investigation.

Additionally, a child's "ability to receive and communicate information adequately . . . may be compromised by impairments in attention, memory, and concentration," and this can and often does impede an attorney's capacity to elicit the information necessary for a constitutionally adequate investigation. Steinberg, *supra* note 2, at 475. Specifically, children may experience difficulty "respond[ing] to instructions or . . . provid[ing] important information to [counsel], such as a coherent account of the events surrounding the offense." *Id.*; *see also Kennedy v. Louisiana*, 554 U.S. ___, 128 S. Ct. 2641, 2663 (2008) ("The problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases." (quoting *Atkins*, 536 U.S. at 321)); Cohen, *supra*, at 360 (explaining that youth inhibits counsel's ability to gather information from a child client).

Furthermore, as discussed in Section I.C, *supra*, a child may, to her own detriment, place greater value in protecting her peers or winning their approval than providing counsel with the factual information necessary for appropriate investigative efforts. *See* Julie Whitman & Robert Davis, *Snitches Get Stitches: Youth Gangs and Witness Intimidation in Massachusetts*, The National Center for Victims of Crime, 47 (2007) (detailing results of a study showing that "the idea of being viewed as a snitch was a huge deterrent to reporting crime for youth" and that "youth do not want to be labeled and rejected by their neighbors or peers for snitching").

A child's failure to relate all necessary and relevant information to defense counsel can have devastating consequences for the outcome of her case. When defense counsel is not provided with all of the information necessary for an adequate investigation, "the defendant can be harmed by the inevitable narrowing of vision when the full flexibility of disposition is not considered." Sheldon Krantz et al., The Right to Counsel in Criminal Cases: The Mandate of *Argersinger v. Hamlin* 184 (1976); *see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary."); Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1763, 1776 (2002) (explaining that those who are held in pretrial detention "are more likely to be convicted and to receive a harsher sentence than people freed pending trial," largely because "the defense's ability to locate witnesses is greatly en-

hanced" when a client gains pretrial release since "[m]any potential witnesses are more likely to cooperate and provide information when the lawyer, an unfamiliar face and frequently from a different race and class background, is accompanied by someone they know."). Determinative evidence may go undiscovered. Strategic decisions regarding the representation will be limited by the disadvantage suffered by counsel who is not privy to all the facts at issue. Potentially viable defense theories may be discarded because counsel lacks the factual clarity that a client who was willing to communicate could provide. Accordingly, for child defendants who have not fully communicated all relevant information to counsel, the chances of suffering an extremely harsh and potentially inappropriate sentencing outcome are substantially increased.

III. Compromised Attorney/Child-Client Relationships Can Yield Flawed Decisions to Accept or Reject Plea Bargains.

Defense counsel's diminished ability to obtain vital information from an adolescent client can also have a profound impact on plea negotiations. In order to evaluate the appropriateness of a plea bargain, counsel must have a clear command of all relevant facts. Indeed, the American Bar Association cautions that "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation . . . has been completed . . . ." A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-

6.1(b).[13] As previously discussed, and for a variety of reasons, children often struggle to convey information to counsel and may be unable or unwilling to provide their attorney with all necessary facts and information about their case. As a result, the ability of both the attorney and client to effectively analyze the appropriateness of a plea bargain is critically reduced.

Additionally, a child client must fully understand the conditions and obligations of a plea bargain as well as the rights that will be waived. "A guilty plea . . . is an event of signal significance in a criminal proceeding. . . . [A]nd the high stakes for the defendant require 'the utmost solicitude.'" *Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). Criminal proceedings that expose children to the possibility of a life-without-parole sentence require the child defendant to take stock of a wide range of possible sentencing alternatives and consider the long-term consequences of decisions made during the adjudicatory process:

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[13] *See also* Douglas A. Berman, *From Lawlessness To Too Much Law?: Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 Iowa L. Rev. 435, 446 (2002) ("From the very outset of representation, a defense attorney needs to assess the range of possible trial and sentencing outcomes for his client in order to properly craft an effective defense strategy and evaluate the prospects for striking a beneficial plea bargain."); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 Conn. L. Rev. 569, 576 (1998) (noting that a "defense attorney is more likely to favorably affect his client's sentence if he possesses," *inter alia*, "good lines of communication with his client").

> A defendant who enters . . . a [guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. . . . [B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

McCarthy v. United States, 394 U.S. 459, 466 (1969) (citation and footnotes omitted). Thus, a child must weigh costs and benefits, understand the quantum of proof and caliber of evidence associated with particular charges and evaluate the long and short-term repercussions of all available options before deciding whether to go to trial or enter a guilty plea.

As discussed in Section I.C, *supra*, a child's capacity to fully engage in this critical evaluative process is greatly reduced, relative to that of an adult, because adolescents' ability to conduct reasoned deliberation regarding a plea offer may be diminished by their impulsive and reckless nature and limited temporal perspective that often focuses on immediate, rather than long-term, consequences.

A child's ability to thoroughly consider a plea bargain is also reduced by the simple fact that children possess significantly less practical knowledge and experience to inform their choices and understand the consequences of a guilty plea or trial than adults. Puritz, *supra*, at 474; Clarke, *supra* note 2, at 694 ("As a class, adolescents are likely to have less knowledge and experience to draw on in making de-

cisions than adults."). The values and experiences that drive a teenager's choices are grounded upon characteristics that are not as established or static as those of adults. Melinda Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 Behav. Sci. Law 175, 179 (2003). Unlike an adult, the experiences, values, and priorities that a child will rely on in evaluating the desirability of a plea bargain are likely to change because teenagers are still in the process of maturation. Thus their decision-making is likely to be very different from that of an adult. Schmidt, *supra*, at 179-80.

The barriers of trust described in Section I.A, *supra*, also affect the attorney's ability to properly counsel a child about a plea offer. "A good lawyer tries to persuade his client to plead guilty when, in his or her professional opinion, a plea will produce a better outcome. . . . If the [child] client does not trust his lawyer, the client's instincts will tell him to fight the lawyer at every step. Representation, and likely the outcome, will suffer." Hoeffel, *supra*, at 542 (footnotes omitted); *see also* Scott, *Evolution*, *supra*, at 171 (footnotes omitted) (explaining that "[h]ow defendants respond to attorneys' advice and weigh the consequences of their choices in the trial process may be affected by psychosocial factors such as peer and adult influence, temporal perspective, and risk preference and perception," and these factors "might influence youths' judgments about the value of accepting plea bargains and of waiving important rights in the legal process").

Even in those instances when children heed their attorney's advice, the questionable reasoning and judgment a child may employ in reaching a decision to accept or reject a plea bargain is also a source for concern. The potential problem can manifest itself in one of two ways: (1) as discussed in Section I.A, *supra*, a child may reject, out of hand, an attorney's recommendation regarding a plea bargain because she is inclined to reject any advice offered by an adult or authority figure; or (2) the child may fail to take on the requisite directive role in the attorney-client relationship due to her socialization to let adults make decisions for her. *See* Scott, *Developmental Incompetence, supra*, at 824 (noting that in a recent study of psychosocial influences on adolescent decision-making regarding plea offers, "75% of the eleven- to thirteen-year-olds, 65% of the fourteen- to fifteen-year-olds, and 60% of the sixteen- to seventeen-year-olds recommended accepting the plea offer," compared to the "evenly divided" responses of young adults, thus suggesting "a much stronger tendency for adolescents than for young adults to make choices in compliance with the perceived desires of authority figures"); *see also* Grisso, *supra*, at 19 ("[T]he process of achieving autonomy and a sense of identity often takes the adolescent through phases in which others' values play a strong role in his or her choices. At times this will be manifested in extreme deference to others' judgments . . . , while at other times choices may be made primarily in opposition to others' preferences."). Whether a youth rebels against the judgment of adult actors, exercises a strict fidelity to the views of others, or acts in a way that combines or contradicts both of these methods of decision-making, children are forced to find an ap-

propriate balance between their own feelings of distrust in the system and reliance on counsel. In reaching this balance a young person often acts to her own detriment, ensuring that the ultimate result is an exceedingly complicated and often deficient relationship with counsel. *See generally* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. and Hum. Behav. No. 4, 333, 357-361 (2003) (discussing influence of authority figures on adolescent decision-making).

At bottom, children facing the possibility of a life without parole sentence must engage in the daunting task of weighing a multitude of complex factors in order to reach a decision about a plea bargain that may have permanent and lifelong consequences. The compromised attorney/child-client relationship combined with the characteristics of youth and other factors yield a strong likelihood of error in this critical decision-making process. *See* Pinard, *supra*, note 11 at 1121 ("[G]iven the studies that have found both that juveniles do not understand the various phases of the criminal process and they cannot fully comprehend long-term consequences (or tend to ignore these consequences in favor of immediate consequences), serious questions should arise as to whether juveniles can adequately consider, weigh and understand these consequences when analyzing the merits of entering a guilty plea.").

For children subject to life without parole sentences, a faulty plea decision can result in a veritable death sentence with no hope for a life outside of prison.

IV. Compromised Attorney/Child-Client Relationships Can Contribute to Children Facing Inappropriately Harsh Prison Conditions.

For the reasons detailed above, a reduced capacity to develop and sustain a meaningful attorney/client relationship can play a critical role in inappropriate sentence outcomes. This concern is particularly salient in the context of extreme sentences where children may not only receive severe and permanent sentences that fail to accurately reflect culpability, but also where children, once sentenced, are likely face unique suffering in adult prison.[14] This circumstance further demonstrates the inappropriateness of juvenile life without parole sentencing.

"Adolescents in adult institutions have a relatively low and weak position in the social hierarchy of prison, and physical vulnerability to attack accompanies their low status." Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You*, 16 Notre Dame J. L. Ethics & Pub. Pol'y 1, 22 (2002). Consequently, when compared to adults, children in the adult institutions are "eight times more likely to commit suicide, 500 times more likely to be sexually assaulted and 200 times more likely to be beaten by staff than adults." Amanda M. Kellar, *They're Just*

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[14] A majority of states (31) house transferred youth offenders in adult correctional facilities. Bishop, *Juvenile Offenders*, *supra*, at 138. "Florida leads the nation in incarcerating children between the ages of thirteen and seventeen in adult prisons." Paolo G. Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 Fla. St. U. L. Rev. 471, 471 (2001).

Kids: Does Incarcerating Juveniles With Adults Violate the Eighth Amendment?, 40 Suffolk U. L. Rev. 155, 171 (2006) (citing Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PLI/Crim. 395, 407-08 (1999) (citing an American Bar Association study comparing violence juveniles face to violence adults face)). Unfortunately, traditional attempts to protect children in adult prison often fail because isolation in protective custody excludes the child from educational and other programming activities. Bishop, *Juvenile Offenders*, *supra*, at 146.

Thus, the adult "correctional setting becomes the environment for social development" during an adolescents' most "formative period of development," thereby "stunt[ing] the development of cognitive growth and psychosocial maturity . . . [and] likely exacerbat[ing] rather than ameliorat[ing] many of the very factors that lead juveniles to commit crimes in the first place (mental illness, difficulties in school or work, and . . . psychological immaturity)." Steinberg, *supra* note 2, at 478, 480.

While these problems affect children in adult prison regardless of their sentence, they take on a qualitative difference for those young people who have no hope of ever escaping the violence of their surroundings.

CONCLUSION

The characteristics of youth may always present a potential barrier to effective representation by counsel and contribute to unfair criminal justice outcomes. Given the severity and finality of juvenile life without parole sentencing, the ways in which compromised attorney/child-client relationships can contribute to unreliable sentencing outcomes supports the significant constitutional concerns raised by Petitioners and their other supporting *amici*. This Court should therefore conclude that life without parole sentences for offenders under age 18 at the time of their offense violates the Eighth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

TERRANCE TAMAR GRAHAM, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

JOE HARRIS SULLIVAN, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Eighth Amendment's prohibition of "cruel and unusual punishments" bar sentencing violent juvenile offenders to life without parole?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 6

I. The Eighth Amendment Does Not Categorically Bar The Imposition Of A Sentence Of Life Without Parole For All Juvenile Offenders 8

A. To succeed in their facial challenge, petitioners must show that there is no set of circumstances under which a life-without-parole sentence would be constitutionally valid against a juvenile. 8

B. Outside the capital punishment context, this Court has never categorically exempted an entire class of offenders from a particular punishment. 11

C. This Court's gross proportionality principle for non-capital sentences requires individual comparison, not categorical treatment 13

D. The infrequency with which life without parole is imposed upon juvenile offenders demonstrates that this punishment is only being sought and imposed in the most severe cases. 18

II. Graham's And Sullivan's Sentences Are Not Grossly Disproportionate, And Their Cases Illustrate The Folly Of A Categorical Prohibition On Life Sentences For Juveniles 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Atkins v. *Virginia*,
536 U.S. 304 (2002) 11-12

Baze v. *Rees*,
128 S. Ct. 1520 (2008) 22

Ewing v. *California*,
538 U.S. 11 (2003) 13, 15, 21

Furman v. *Georgia*,
408 U.S. 238 (1972) 12

Gregg v. *Georgia*,
428 U.S. 153 (1976) 11

Harmelin v. *Michigan*,
501 U.S. 957 (1991) 2, 13-15

Hutto v. *Davis*,
454 U.S. 370 (1982) 13

Kennedy v. *Mendoza-Martin*,
372 U.S. 144 (1963) 23

Lockett v. *Ohio*,
438 U.S. 586 (1978) 12

Lockyer v. *Andrade*,
538 U.S. 63 (2003) 7, 13

Naovarath v. *State*,
779 P.2d 944 (Nev. 1989) 17

O'Dell v. *Netherland*,
521 U.S. 151 (1997) 21

Parke v. *Raley*,
506 U.S. 20 (1992) 15

Penry v. *Lynaugh*,
492 U.S. 302 (1989) 16

People v. *Dillon*,
668 P.2d 697 (Cal. 1983) 17

People v. *Miller*,
781 N.E.2d 300 (Ill. 2002) 16-17

Phillips v. *State*,
807 So. 2d 713 (Fla. App. 2002) 17

Pittman v. South Carolina,
647 S.E.2d 144 (S.C. 2007) 23

Ring v. *Arizona*,
536 U.S. 584 (2002) 11, 22

Roper v. *Simmons*,
543 U.S. 551 (2005) ..... *passim*

Rummel v. *Estelle*,
445 U.S. 263 (1980) 2, 12, 15

Schall v. *Martin*,
467 U.S. 253 (1984) 10

Simmons v. *South Carolina*,
512 U.S. 154 (1994) 22

Solem v. *Helm*,
463 U.S. 277 (1983) 14, 21

Spaziano v. *Florida*,
468 U.S. 447 (1984) 12

Stanford v. *Kentucky*,
492 U.S. 361 (1988) 14, 16, 18

Thompson v. *Oklahoma*,
487 U.S. 815 (1988) 11

United States v. *Salerno*,
481 U.S. 739 (1987) 7, 9-10

Woodson v. *North Carolina*,
428 U.S. 280 (1976) 13

STATUTES

18 U.S.C. § 3141(e) (1982 & Supp. III 1993) 10

Fla. Stat. § 985.557 (2007)..... 18-19

Fla. Stat. § 985.565 (2007)..... 19

OTHER AUTHORITIES

Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) 14

U.S. Const., amend. i 9

U.S. Const., amend. viii .....*passim*

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Sentencing a juvenile to life imprisonment without the possibility of parole is a weighty matter. Prosecutors do not seek such punishment lightly, nor do courts impose it without careful consideration and compelling reasons. But youthful offenders sometimes commit heinous crimes—rapes, kidnappings, and violent robberies and assaults that may leave the victim maimed for life, or worse. Many do so with full knowledge of the wrongfulness of their actions, and with callous disregard of both the demands of the law and the rights of their victims. And many are already repeat offenders with histories of recidivism. Such offenses cannot be chalked up to "youthful indiscretion." It is in these rare and tragic cases of heinous crimes committed by already-hardened and violent juvenile offenders that a State can and must be allowed to impose the severe sanction of life imprisonment without parole.

The crimes committed by juveniles, like those committed by adults, vary in severity. And individual juvenile offenders, like adult criminals, have different levels of maturity, culpability, and potential for rehabilitation. But petitioners would have this Court impose a categorical rule that the imposition of a life sentence without parole on a juvenile is *always* "cruel and unusual punishment"—regardless of the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. NDAA is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

nature and severity of the crime, the individual defendant's maturity and criminal history, or the procedural safeguards the State has put in place to avoid grossly disproportionate sentences.

This one-size-fits-all approach is not mandated by the Constitution. Indeed, it runs squarely afoul of this Court's holding that for non-capital punishments, the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate'" to the individual crime. *Harmelin* v. *Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment). As the Court has recognized, such cases are "exceedingly rare." *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980). To proportionately punish the guilty, adequately protect the public, and deter future crimes, prosecutors and judges must have the flexibility to ensure that violent crimes committed by the most dangerous juvenile offenders may be met with an appropriately severe sanction—one that, in their best judgment, protects society from further depredation at the hands of those who, young as they may be, have already demonstrated that they pose a severe risk to those around them.

Amicus National District Attorney's Association (NDAA) has an obvious, powerful interest in this Court's resolution of the question presented. NDAA is the oldest and largest professional organization representing U.S. criminal prosecutors. Its members are state and local prosecutors who, in the exercise of their prosecutorial discretion, bear the heavy burden of deciding whether to seek the most severe possible sanctions against juvenile offenders—including life imprisonment without parole—when the circumstances so warrant. The relative rarity of juvenile life-without-parole sentences is a testament that this

responsibility is not discharged lightly. Prosecutors (and courts) recognize that life without parole is a severe sanction that should be imposed on a youthful offender only in extreme circumstances, and as a consequence, the penalty is rarely imposed. But that does not mean that the Constitution bars such punishment on those rare occasions when it is necessary to protect society.

STATEMENT

These cases concern two recidivist juvenile offenders who were convicted of violent felonies and sentenced to life imprisonment without parole.

1. Petitioner Joe Harris Sullivan was thirteen years old when he was convicted of sexual battery and burglary of a dwelling in a Florida state court. Sullivan and two accomplices broke into the then-unoccupied home of an elderly woman and stole jewelry and coins. Later the same day, Sullivan and an accomplice returned to the home, which was now occupied. When the 72-year-old victim attempted to prevent Sullivan from entering her home, he forced his way in and threw a black slip over her head. Sullivan took her to the bedroom where he stripped her, beat her, and brutally raped and sodomized her. Sullivan threatened to kill the victim several times, but stated that if she couldn't identify him, he "might not have to kill her." As a result of the rape, the victim sustained bruising, a laceration to the vulva, and a vaginal tear that required surgery to repair. A police officer who was called to the scene by a neighbor saw Sullivan fleeing the house immediately after the rape.

Sullivan was arrested, tried, and convicted. At sentencing, the trial court was confronted with Sulli-

van's extensive prior criminal record. In the two years before his conviction, Sullivan had been found guilty of seventeen criminal offenses comprising several serious felonies (including an assault on his juvenile counselor and a prior burglary during which Sullivan killed a dog). Based on this prior record, Sullivan far exceeded the predicate needed under Florida's sentencing guidelines to impose a life sentence. The court found that, in light of these facts and the nature of the crimes, an adult sentence was appropriate. It sentenced Sullivan to life imprisonment on the sexual battery charges and to 30 years' imprisonment (later reduced to 15 years) on the burglaries.

More than 15 years after his conviction and sentencing, Sullivan filed a state post-conviction motion, arguing that this Court's decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), had created a new constitutional right that entitled him to relief from his sentence. The trial court dismissed the motion as untimely, and the Florida District Court of Appeal affirmed.

2. Petitioner Terrence Jamar Graham was sixteen years old when he and an accomplice entered a restaurant while wearing masks and demanded that the restaurant manager give them money. When the manager refused, Graham's accomplice hit him in the head twice with a steel bar. Graham and his accomplice then fled the scene.

Graham was arrested and confessed to the crime. He was charged with attempted robbery and burglary with an assault or battery, which carried a maximum sentence of life imprisonment without parole. After a hearing, he was certified to be tried as an adult.

Graham pleaded guilty to both offenses. The court withheld adjudication and sentenced Graham to 12 months in jail and three years of probation. During his plea colloquy, Graham acknowledged that he was being sentenced as an adult and waived his right to have the court consider the imposition of juvenile sanctions. He was certified as an adult for any future criminal violations.

While on probation, Graham—who was seventeen years old by this time—was arrested on new charges of home-invasion robbery and fleeing and eluding the police. Graham and his accomplices had robbed the homeowner at gunpoint; Graham himself held a cocked gun to the victim's head while he and his accomplices entered the home and demanded money from the occupants. They stole a gold crucifix from another occupant of the home and barricaded both victims in a closet before leaving the scene. Graham was apprehended after a high-speed automobile chase. After his arrest, Graham told police that he had been involved in "[t]wo or three" other robberies before the home invasion. He also admitted fleeing and attempting to elude a law enforcement officer.

A Florida court found that Graham had violated the conditions of his probation by possessing a weapon, committing the home-invasion robbery, and fleeing from police. The court, finding that further juvenile sanctions would not be appropriate, sentenced Graham to life imprisonment without possibility of parole. The court concluded that "this is an escalating pattern of criminal conduct * * * and that we can't help you any further. We can't do anything to deter you. * * * Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your

life and that the only thing I can do now is to try to protect the community from your actions." Graham Pet. App. 3–4. Graham was nineteen at the time of sentencing.

Graham appealed, arguing that his sentence was cruel and unusual punishment under the Florida and U.S. Constitutions. The Florida District Court of Appeals rejected Graham's facial challenge, holding that this Court's decision in *Roper* did not establish that sentencing a juvenile to life imprisonment is cruel and unusual in all situations. It also rejected Graham's challenge that the sentence was grossly disproportionate as applied to him. The court took into account that "after being placed on probation—an extremely lenient sentence for the commission of a life felony—[Graham] committed at least two armed robberies and confessed to the commission of an additional three." Graham Pet. App. 17. The court noted the violent nature of the offenses, and recognized that the "offenses were not committed by a pre-teen, but a seventeen-year-old." *Ibid.* Based on these individualized circumstances, the Florida court held that Graham's sentence was not grossly disproportionate.

SUMMARY OF ARGUMENT

Petitioners would have this Court categorically declare unconstitutional the imposition of a sentence of life without parole on any juvenile offender, regardless of the severity of the crime, the individual offender's maturity and culpability, and the juvenile's criminal history. Essentially, they are asserting a facial challenge against the application of this punishment to juveniles as a class.

As we demonstrate below in Part I, petitioners' approach is foreclosed by this Court's holding that a

law may not be declared facially unconstitutional unless there is no set of circumstances under which the challenged law would be valid. See *United States* v. *Salerno*, 481 U.S. 739 (1987). Here, petitioners bear the burden of showing that there is no case in which the imposition of a life-without-parole sentence would be constitutionally valid against a juvenile. They cannot carry this burden.

Petitioners' reliance on the categorical exclusions set forth in *Roper* v. *Simmons*, 543 U.S. 551 (2005), is inapposite. *Roper* was a death penalty case and, as this Court has held time and again, "death is different." Given both the irrevocability and the ultimate severity of the death penalty, its imposition implicates prophylactic rules that do not apply to sentences of imprisonment—even imprisonment for life. Outside of capital punishment, this Court has *never* exempted a whole class of offenders from a particular category of punishment on the ground that it would be cruel and unusual. Because life imprisonment does not raise the same issues as a sentence of death, the Court should decline petitioners' invitation to do so now.

Rather, this Court should apply its long-standing and well-established methodology for judging the constitutionality of a prison term: whether the sentence is "grossly disproportionate" to the individual crime. See *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003). This methodology shuns categorical distinctions; rather, it looks to case-specific factors like the severity of the crime and the offender's criminal history. While a court reviewing the proportionality of a non-capital sentence is under no constitutional obligation to take into consideration mitigating factors like the offender's age, if youth has any place in the

calculus, it is as one of many factors to be weighed, not as the source of an independently determinative bright-line rule.

Applying these principles to Graham's and Sullivan's sentences, it is clear, as we show in Part II, that the imposition of life without parole was not grossly disproportionate in those cases. Both petitioners engaged in serious crimes of violence that posed a great threat to public safety. Each had a long record of prior offenses that suggested that rehabilitation was not an option. And each continued to commit violent crimes after receiving relatively lenient treatment for their prior offenses. Under these circumstances, a sentence of life without parole is not cruel and unusual punishment. And Graham's and Sullivan's cases well illustrate the wisdom of *avoiding* the categorical bar they seek.

I. The Eighth Amendment Does Not Categorically Bar The Imposition Of A Sentence Of Life Without Parole For All Juvenile Offenders.

A. To succeed in their facial challenge, petitioners must show that there is no set of circumstances under which a life- without-parole sentence would be constitutionally valid against a juvenile.

As noted, petitioners do not merely argue that the imposition of a life sentence without parole was grossly disproportionate *in their particular cases.* Rather, they ask this Court to rule categorically that such a sentence is *always* cruel and unusual when imposed on a juvenile—regardless of the nature of the crime, the age and maturity of the offender, the

offender's prior criminal history, or the individualized determinations made by the sentencing court.[2] This argument runs counter to both this Court's jurisprudence about facial challenges and its general Eighth Amendment precedent, which holds that a punishment must be "grossly disproportionate" to the specific offense in order to be deemed "cruel and unusual."

To mount a successful facial challenge outside of the First Amendment context, a petitioner "must establish that no set of circumstances exists under which the [challenged law] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Ibid.*

Salerno is illustrative. The petitioner there argued that the federal Bail Reform Act was facially unconstitutional under both the Due Process Clause and the Excessive Bail Clause of the Eighth Amendment, because it permitted pretrial detention without bail upon a judicial officer's determination that alter-

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[2] See Graham Br. 32 ("juvenile defendants *as a class* possess certain characteristics, in particular diminished culpability and capacity for change, that render unconstitutional their sentences") (emphasis added); *ibid.* at 36 ("no contemporaneous sentencing procedure, even those related to Graham's individual characteristics, could make the sentence imposed constitutional"); *ibid.* at 50 ("[H]ere, this Court should categorically reject the proposition that the Eighth Amendment permits a sentencing judge to determine, on a case-by-case basis, when a life-without-parole sentence is appropriate for a juvenile offender who commits a non-homicide."); Sullivan Br. 57 ("a categorical rule barring the infliction of a life-without-parole sentence on any offender under a certain age is necessary").

native procedures would not "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3141(e) (1982 & Supp. III 1993); see also *Salerno*, 481 U.S. at 745. The Court disagreed, concluding that "whether or not [the procedures of the Act] might be insufficient in some particular circumstances," they survived facial challenge because they were "'adequate to authorize the pretrial detention of at least some [persons] charged with crimes.'" *Ibid.* at 751 (quoting *Schall* v. *Martin*, 467 U.S. 253, 264 (1984)).

Petitioners here do not challenge the constitutionality of statutes authorizing the imposition of a life sentence without parole in all circumstances; they do not, for example, challenge the constitutionality of such a statute as applied to adults. But they do seek a categorical ruling that such laws are always unconstitutional as applied to juveniles, regardless of circumstances.[3] To succeed in such a limited facial challenge under *Salerno*, petitioners must show that there is no set of circumstances under which imposition of a life-without-parole sentence would be constitutionally valid against a juvenile.

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[3] Graham contends that imposition of a life-without-parole sentence is always unconstitutional for an offense committed when the offender was younger than eighteen. Graham Br. 32. Sullivan argues that such sentences are categorically unconstitutional for "any offender under a certain age," and leaves it to the Court to draw that line somewhere between fourteen and eighteen. Sullivan Br. 58–61.

B. Outside the capital punishment context, this Court has never categorically exempted an entire class of offenders from a particular punishment.

Petitioners cannot meet this burden. Outside the death penalty context, this Court's Eighth Amendment jurisprudence holds that a sentence of imprisonment may be found unconstitutional only if it is "grossly disproportionate" to the specific offense. In making this determination, this Court has weighed factors like the severity and violence of the offense and the culpability and criminal history of the offender. The question of whether a sentence is grossly disproportionate is thus an inherently individualized and fact-specific inquiry that does not permit of categorical treatment.

Indeed, outside the death penalty context, this Court has never exempted a whole class of offenders from a specific punishment on the ground that its imposition would be categorically cruel and unusual. The only such categorical rulings have dealt solely with capital punishment. See *Thompson* v. *Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (holding that Eighth Amendment prohibits execution of persons under 16 years of age at the time of the offense); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (same for mentally retarded persons); *Roper*, *supra* (same for persons under 18 years of age at the time of the offense).

The reason for these extraordinary exemptions is clear: As this Court has stated time and again, "[d]eath is different." *Ring* v. *Arizona*, 536 U.S. 584, 605–606 (2002) (citation omitted). See also, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (joint

opinion of Stewart, Powell, and Stevens, JJ.) (noting that the "penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (death penalty is "qualitatively different" from other punishments); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984) (citing Court's prior recognition of the "'qualitative difference' of the death penalty"). First, the finality of execution—unlike even the most severe sentence of imprisonment—makes the consequences of error irrevocable and irreversible. See *Rummel*, 445 U.S. at 272 ("The penalty of death * * * * is unique in its total irrevocability.") (quoting *Furman* v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); *Furman*, 408 U.S. at 290 (Brennan, J., concurring) (the "finality of death precludes relief"). And second, the death penalty is "uniqu[e] * * * [in] its extreme severity"; it is the "ultimate sanction." *Furman*, 408 U.S. at 286–290 (Brennan, J., concurring).

Given the death penalty's unique severity and irrevocability, the Court has decreed that it must be reserved for those whose "extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). It is these unique concerns that underlie the categorical prophylactic rules announced in cases like *Atkins* and *Roper*. The *Roper* Court itself affirmed a life sentence without possibility of parole for a conviction based on juvenile conduct. *Roper*, 543 U.S. at 578–579.

These unique considerations that capital punishment invokes simply do not apply to prison terms, even life without parole. This Court has long recognized that the "penalty of death is qualitatively different from a sentence of imprisonment, however

long." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Indeed, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Ibid.*

C. This Court's gross proportionality principle for non-capital sentences requires individual comparison, not categorical treatment.

Although this Court's non-capital Eighth Amendment jurisprudence has not always been pellucid, "one governing legal principle emerges as 'clearly established' * * * * A gross disproportionality principle is applicable to sentences for terms of years." *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003); see also *Ewing* v. *California*, 538 U.S. 11, 20 (2003) ("The Eighth Amendment * * * contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'") (quoting *Harmelin*, 501 U.S. at 996–997 (Kennedy, J., concurring in part and concurring in the judgment)). Although "the precise contours of [this principle] are unclear," the Court has emphasized that it is "applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer*, 538 U.S. at 73 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)); see also *Ewing*, 538 U.S. at 21 ("federal courts should be reluctant to review legislatively mandated terms of imprisonment, and * * * successful challenges to the proportionality of particular sentences should be exceedingly rare") (quoting *Hutto* v. *Davis*, 454 U.S. 370, 374 (1982) (*per curiam*)).

In conducting proportionality review, this Court compares the nature and severity of the offense with

the sentence. That is, it evaluates the "nexus between the punishment imposed and the defendant's blameworthiness" to ensure that they are proportional. *Stanford* v. *Kentucky*, 492 U.S. 361, 382 (1988) (O'Connor, J., concurring in part and concurring in the judgment). Such review is lenient and deferential, guided as it is by the principles of "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

Because proportionality review requires a court both to defer to legislative policy determinations and to evaluate the nexus between a *particular* crime and a *particular* sentence, it cannot support the kind of categorical facial attack that petitioners mount here. Indeed, this Court has already held that violent crimes may support harsher sentences than nonviolent offenses. See *Solem* v. *Helm*, 463 U.S. 277, 292–293 (1983) ("nonviolent crimes are less serious than crimes marked by violence or the threat of violence"); *ibid.* at 296 (holding life sentence without parole for issuing a bad check unconstitutional because offense was "one of the most passive felonies a person could commit").[4]

The lack of direct violence need not, however, invalidate a severe sentence where the crime otherwise

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[4] It is significant that *Solem*, which involved a passive and nonviolent financial fraud offense, is the *only* case in which this Court has invalidated a prison sentence as disproportionate. See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1058 (2004).

poses a serious threat to society. *See Ewing*, 538 U.S. at 28 (holding that non-violent theft of golf clubs valued at $1,200 supported sentence of life imprisonment with no chance of parole for 50 years); *Harmelin*, 501 U.S. at 1002–1003 (Kennedy, J., concurring in part and concurring in the judgment) (upholding sentence of life imprisonment for cocaine possession based on the "direct nexus between illegal drugs and crimes of violence"). Petitioners' categorical approach asks the Court to ignore this precedent and to declare *all* life-without-parole sentences unconstitutional for juvenile offenders—with no consideration of how serious or horrifically violent the offense may have been.

This Court has also looked to the offender's criminal history in judging proportionality. Because "'[s]tates have a valid interest in deterring and segregating habitual criminals' * * * * [r]ecidivism has long been recognized as a legitimate basis for increased punishment." *Ewing*, 538 U.S. at 25 (quoting *Parke* v. *Raley*, 506 U.S. 20, 27 (1992)). Thus, proportionality review must take into account "the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276 (upholding life sentence for third nonviolent fraud felony, where amounts at issue were $80, $23.36, and $120.75). Petitioners' categorical rule again ignores this long-standing precedent and would preclude any consideration of a juvenile's criminal history in evaluating the proportionality of a sentence of life without parole.

Relying heavily on *dicta* from *Roper*, petitioners nevertheless argue that juvenile offenders should be exempt from this Court's well-established proportionality standard because they are categorically less culpable than adults. But even if *some* juveniles may demonstrate an underdeveloped sense of responsibility or impulse control that renders them somewhat less culpable, or may be somewhat less amenable to the deterrent effect of the criminal law, that does not mean that there is *no* juvenile offense severe enough to support the imposition of life without parole. See *Stanford*, 492 U.S. at 378 ("it is not demonstrable that no 16-year-old is 'adequately responsible' or significantly deterred"). In deciding how to charge and sentence such offenders, prosecutors and courts properly take into account factors like criminal culpability. And in appropriate circumstances, so may appellate courts determining whether a particular sentence (including life without parole) is grossly disproportionate.[5]

But those same courts should also be able to take into account the other well-established factors—like severity, violence, and criminal history—that *also* bear on an offender's culpability.[6] While it may be

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[5] Unlike in the death penalty context, there is no constitutional requirement that a court conducting non-capital proportionality review take into account all mitigating factors, such as age. Compare *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (capital jury must be empowered to consider and give effect to all mitigating evidence). However, such factors may sometimes be relevant in judging the offender's culpability.

[6] The state court cases cited by petitioners involve precisely this type of fact-specific inquiry; they do not purport to apply a categorical rule against the imposition of life without parole on *all* juvenile offenders. In *People* v. *Miller*, 781 N.E.2d 300 (Ill. 2002), for example, the Illinois Supreme Court held that the im-

that "it is statistically aberrant for boys to refrain from minor criminal behavior" during adolescence, see Sullivan Br. 21, it is equally clear that the vast majority of juveniles can and do refrain from committing *repeated and serious violent felonies*—like rape and aggravated burglary. That a juvenile commits such acts says as much about his or her culpability as does chronological age.

Of course, not every juvenile offender is "irretrievably depraved or permanently flawed." Sullivan Br. 24. But a small number may be, and in those rare cases, a State should not be categorically prohib-

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position of life without parole on a 15-year-old who acted, without premeditation, as a passive lookout during murders violated state constitution's proportionate penalties clause. But it made clear that it could contemplate other situations where "a sentence of natural life imprisonment without the possibility of parole [would be] appropriate" for a more culpable juvenile offender. *Ibid.* at 309.

Similarly, in *Naovarath* v. *State*, 779 P.2d 944, 946 (Nev. 1989), the Nevada Supreme Court invalidated a life sentence imposed on a 13-year-old convicted of killing a man who had repeatedly molested him, but noted that "[w]hen a child reaches twelve or thirteen, it may not be universally agreed that a life sentence without parole should never be imposed." And in *People* v. *Dillon*, 668 P.2d 697, 726–727 (Cal. 1983), the California court overturned the imposition of a life-without-parole sentence on a minor convicted of felony murder only after a fact-specific inquiry in which it concluded that the offender was an "unusually immature youth" who "had had no prior trouble with the law" and "was not the prototype of a hardened criminal who poses a grave threat to society." See also *Phillips* v. *State*, 807 So. 2d 713, 718 (Fla. App. 2002) (upholding juvenile sentence of life without parole, but only after considering offender's age as part of proportionality determination: "[A]lthough Mr. Phillips' culpability may be diminished somewhat because of his age at the time of the commission of the crime, the factor of his age is outweighed by his heinous conduct and the ultimate harm—death—that he inflicted upon his victim.")

ited from imposing a proportionate punishment that fits the crime. Petitioners' facial challenge should be rejected.

D. The infrequency with which life without parole is imposed upon juvenile offenders demonstrates that this punishment is only being sought and imposed in the most severe cases.

Petitioners correctly note that the imposition of life without parole on juveniles is rare. But this does not mean that such sentences are cruel and unusual. To the contrary, it suggests that the most severe sentences are being reserved for the most horrific crimes and the most hardened and dangerous juvenile offenders. This is an argument not against, but in favor of, the proportionality of the penalty in those exceptional cases.

There is no question that sentencing a juvenile to life imprisonment without parole is a weighty decision. Indeed, "[t]he very considerations which induce petitioners and their supporters to believe that [such a sentence] should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed." *Stanford*, 492 U.S. at 374. To ensure that such a severe penalty is not imposed except in appropriate circumstances, States channel prosecutorial discretion and judicial determinations through procedures which introduce multiple checks into the process of juvenile sentencing.

In Florida, for example, the initial decision as to whether to prosecute a juvenile as an adult typically rests in the hands of the prosecutor, but is guided by statutory requirements. See Fla. Stat. § 985.557 (2007). A prosecutor may charge any 16- or 17-year

old as an adult if, in his or her judgment and discretion, "the public interest requires that adult sanctions be considered or imposed." *Ibid.* § 985.557(1)(b). But a prosecutor may charge a 14- or 15-year-old as an adult only for certain enumerated violent felonies. *Ibid.* at § 985.557(1)(a). These requirements ensure that adult penalties will only be sought in cases involving the most mature offenders and most serious violent crimes.

Even after a juvenile is prosecuted and convicted as an adult, he or she may still be sentenced as a juvenile based on various factors, including the seriousness and violence of the offense; the offender's sophistication and maturity; the offender's criminal history; and the prospects of reasonable deterrence and rehabilitation. *Ibid.* at § 985.565(1)(b) (2007). It is thus only if both the prosecutor *and* the court decide, in the exercise of their discretion, that the circumstances do not warrant juvenile sentencing that a juvenile in Florida will be sentenced as an adult.

Given these procedural safeguards, it is unsurprising that it is rare for a juvenile to receive an adult sentence of life without parole—even in Florida, the State where such sentences are the most common. This rarity simply confirms that prosecutors and courts have used their guided discretion to confine application of this severe sanction to the most severe offenses and hardened juvenile offenders.

II. Graham's And Sullivan's Sentences Are Not Grossly Disproportionate, And Their Cases Illustrate The Folly Of A Categorical Prohibition On Life Sentences For Juveniles.

The facts underlying petitioners' own sentences demonstrate that imposition of life without parole

has been confined to rare and deserving cases. Applying the principles announced by this Court to their individual offenses, neither Graham's nor Sullivan's sentence is grossly disproportionate—and the facts of their cases illustrate the absurdity of the categorical rule they seek in this Court.

1. As noted, Graham was convicted of armed burglary, a violent felony, which he committed at age sixteen. In the course of that burglary, Graham's accomplice beat the victim on the head with a steel bar. Graham received a lenient sentence of 12 months in county jail plus probation—in part by voluntarily waiving his right to be sentenced as a juvenile if he committed future offenses. Given a second chance by the courts, Graham promptly violated his probation by committing (at age seventeen) another violent robbery and burglary: a home invasion during which he held a cocked gun to the victim's head. He also confessed to having committed several other burglaries for which he was not formally charged.

While Sullivan was only thirteen when he committed his principal offenses, the details of those crimes are shocking in their violence and brutality. After burglarizing an unoccupied house, he later returned to the house and brutally raped and sodomized its elderly occupant, while beating her and repeatedly threatening to kill her. Sullivan's sexual assault was so violent that the victim suffered vaginal tears requiring surgery to repair.

Even at his young age, moreover, Sullivan was already a serial recidivist. At the time of his sentencing on the sexual assault and burglary charges, he had committed *seventeen* prior serious felonies, including burglary. He had also proven himself una-

menable to juvenile rehabilitation, having seriously assaulted one of his juvenile counselors.

Both Graham's and Sullivan's sentences were predicated on "crimes marked by violence or the threat of violence"—a factor that weighs heavily in the proportionality calculus. *Solem*, 463 U.S. at 292–293. Moreover, both Graham and Sullivan were violent recidivists. As the Florida Court of Appeals noted, these facts were "record evidence to support [Graham's] inability to rehabilitate." Graham Pet. App. 18.

Sullivan's record of prior offenses was even lengthier—with 17 prior serious felonies, most of them violent. Under these circumstances, the State's "'valid interest in deterring and segregating habitual criminals'" provides a "legitimate basis for increased punishment." *Ewing*, 538 U.S. at 25 (citation omitted).

Based on the well-established factors that this Court has traditionally weighed in determining the proportionality of a sentence, Graham's and Sullivan's sentences are not grossly disproportionate.

2. More important for present purposes, the facts of these two cases compellingly show the folly of any *per se* prohibition on life sentences for juvenile offenders. One of the reasons this Court has found it acceptable to limit the death penalty—and to categorically preclude it in certain kinds of cases—is that such limitations do not necessarily increase the risk to society when the alternative of life without parole is available. See, *e.g.*, *Roper*, 543 U.S. at 572 ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of

parole is itself a severe sanction, in particular for a young person."); *O'Dell* v. *Netherland*, 521 U.S. 151, 158 (1997) ("a prosecutor's future dangerousness argument will 'necessarily [be] undercut' by 'the fact that the alternative sentence to death is life without parole.'") (quoting *Simmons* v. *South Carolina*, 512 U.S. 154, 169 (1994) (plurality op.)); *Baze* v. *Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring) ("the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty"); *Ring*, 536 U.S. at 615 (Breyer, J., concurring) ("As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes."). But that is only because, until now, governments have been free to incarcerate *permanently* the most violent offenders.

If this Court were to adopt the categorical rule urged by petitioners, however, federal and state governments would no longer have that option. They would be forced, under the banner of the Eighth Amendment, to unleash on society people they sincerely and reasonably believe to pose an enormous and unacceptable risk.

Indeed, the combination of *Roper* and a categorical rule against life without parole for juveniles would mean that all governments would be required, at some point, to send even hardened murderers back into society if they were juveniles at the time of their crimes.[7] Invoking the Eighth Amendment to prevent

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[7] Petitioners seek to carve out those who commit homicide from their proposed categorical rule, but provide no justification whatsoever for this exclusion. Even if it can avoid the question

the execution of such offenders is one thing; invoking it to *guarantee* that they will eventually be sent back into society is quite another. Indeed, it is unfortunately not an overstatement to say that, if the Court were to adopt petitioners' proposed rule—even if it excluded convicted murderers—*some* citizens, somewhere, would eventually be murdered as a result. And countless others would suffer lesser injuries.

Nothing in the Eighth Amendment or this Court's case law can reasonably be read to require that result. Life without parole for a juvenile may well be "unusual"—indeed, it is, and it *should* be. But permanent incarceration for the most violent, hardened juvenile offenders is by no means "cruel"—especially by comparison to the harm such offenders could inflict on the public if the Eighth Amendment were construed, categorically, to require that they eventually be released into the general population. "The Constitution is not a suicide pact." *Kennedy* v. *Mendoza-Martin*, 372 U.S. 144, 160 (1963).

CONCLUSION

Petitioners offer no compelling argument to support a categorical rule prohibiting the imposition of life without parole upon juvenile offenders as a class. Rather, under this Court's precedents, courts must apply a test of gross proportionality based on the in-

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in these cases, this Court, if it rules in petitioners' favor, will at some point have to decide why the same protection should not be extended to juvenile murderers. See, *e.g.*, *Pittman* v. *South Carolina*, 647 S.E.2d 144 (S.C. 2007), cert. denied, 128 S. Ct. 1872 (2008) (challenging 30-year sentence for murder committed by 12-year-old as cruel and unusual under *Roper*). And it is far from obvious why the principles that petitioners espouse, if accepted by the Court, would not apply in murder cases as well.

dividual circumstances surrounding the offense. Under this test, neither Graham's nor Sullivan's sentence was grossly disproportionate. And governments cannot reasonably be required, under the banner of the Eighth Amendment, to release into the general population offenders like Graham and Sullivan—much less hardened murderers who escape execution only because of *Roper*—simply because, at the time of their offenses, they happened to have been born a bit later than some arbitrarily selected date.

For all these reasons, the Court should affirm the decisions of the Florida courts.

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AMICUS CURIAE BRIEF

Nos. 08-7412 and 08-7621

In The Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF *AMICI CURIAE* OF NATIONAL ORGANIZATION OF VICTIMS OF JUVENILE LIFERS IN SUPPORT OF RESPONDENT

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Justice for Homicide Victims

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 12

ARGUMENT 13

I. TO ABOLISH THE LIFE WITHOUT PAROLE SENTENCE FOR JUVENILE OFFENDERS ON THE HEELS OF *ROPER* WOULD BE A BAIT-AND-SWITCH VIOLATIVE OF THE HARD-WON RIGHTS OF VICTIMS 13

II. THE OVERWHELMING NATIONAL CONSENSUS IS THAT JUVENILE LIFE WITHOUT PAROLE IS APPROPRIATE AND CONSTITUTIONAL IN LIMITED CASES 21

III. UPHOLDING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS ESSENTIAL FOR THE PROTECTION OF AMERICA'S LAW-ABIDING CITIZENS, PARTICULARLY ITS INNOCENT CHILDREN 24

IV. THE CONSTITUTIONAL JUVENILE LIFE WITHOUT PAROLE SENTENCE IS A NECESSARY AND EFFECTIVE TOOL WITHIN THE CRIMINAL JUSTICE SYSTEM 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Calderon v. Schribner, No. 2:06-cv-00770-TMB, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009) 21

Culpepper v. State, 971 So. 2d 259 (Fla. Dist. Ct. App. 2008), *cert. denied*, 981 So. 2d 1199 (Fla. 2008) 21

In re Nunez, 173 Cal. App. 4th 709 (Ct. App. 4th Dist. 2009).....22

Kenna v. U.S. Dist. Ct. for the Ctr. Dist. of Cal., 435 F.3d 1011 (9th Cir. 2000).....14

Linda R. S. v. Richard D., 410 U.S. 614 (1972).....14

Naovarath v. State, 779 P.2d 944 (Nev. 1989) 22

People v. Bentley, No. 214170, 2000 WL 33519653 (Mich. Ct. App. Apr. 11, 2000).....21

People v. Cooks, 648 N.E.2d 190 (Ill. Ct. App. 1995).....21

Phillips v. State, 807 So. 2d 713 (Fla. Dist. Ct. App. 2002) 21

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1990).....22

State v. Howell, 34 S.W.3d 484 (Tenn. Crim. App. 2000) 21

State v. Jensen, 579 N.W.2d 613 (S.D. 1998) 21

State v. Loukaitis, 1999 WL 1044203 (Wash. Ct. App. 1999).....21

TABLE OF AUTHORITIES – Continued

Page

State v. Warren, 887 N.E.2d 1145 (Ohio 2008) 21

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United States v. L.M., 425 F.Supp. 2d 948 (Iowa N.D. 2006) 16

STATUTES

Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2004).....16

Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515 (1982).....15

Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (1990).....16

Colo. Rev. Stat. § 17-22.5-104(d)(IV) (2006) 23

S.B. 839, 81st Leg., Reg. Sess. (Tex. 2009) 23

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TABLE OF AUTHORITIES – Continued

Page

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Eartha Jane Melzer, *As Bill to Ban Life Imprisonment for Children Languishes, Inequities of Defense Persist*, Mich. Messenger, April 13, 2009 *available at* http://michiganmessenger.com/16689/as-bill-to-ban-life-imprisonment-for-children-languishes-inequities-of-defens-persist (last visited Sept. 17, 2009) 23

TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF *AMICI CURIAE*[1]

National Organization of Victims of Juvenile Lifers ("NOVJL") is a national organization comprised of the families of victims murdered by juvenile offenders, who subsequently were tried and sentenced as adults because of the horrific nature of their extremely violent crimes. NOVJL works to find other victims of violent juvenile offenders tried and sentenced as adults to life in order to protect their voices in the national public policy discussion about the juvenile life sentence and to support each other as victims of the devastating acts of criminally violent teens.

Victims for Justice ("VFJ") specializes in serving and advocating for victims of all violent crimes including assault, robbery, and kidnapping as well as the surviving family and friends of homicide victims. VFJ helps victims cope with trauma and grief, ensures the judicial system respects their rights, advocates for change that will make a balanced justice

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or its counsel made a monetary contribution to its preparation or submission. Petitioner Sullivan and Respondents received timely notice of intent of *amici* to file this brief and letters of consent by the parties have been filed with the Clerk of this Court. *Amici* requested and were granted consent by counsel of record for Petitioner Graham and consent is being filed with this brief.

system, and implements community programs for violence prevention.

Victims of Crime Amendment ("VOCA") was established following the murders of two sorority members at Florida State University in 1978. Its express purpose is to balance the scales of justice by advocating on behalf of families, victims and witnesses. VOCA spearheaded legislation which led to a joint resolution and a statewide citizen vote that successfully amended Florida's Constitution to provide rights for victims of crime and to create and establish victims' rights' offices within the executive office of the governor.

National Organization of Victim Assistance ("NOVA") is a private, non-profit organization of victim and witness assistance programs and practitioners, criminal justice agencies and professionals, mental health professionals, researchers, former victims and survivors, and others committed to the recognition and implementation of victim rights and services. Founded in 1975, NOVA is the oldest national group of its kind in the worldwide victims' movement. NOVA's mission is to promote rights and services for victims of crime and crisis everywhere through national advocacy, direct services to victims, assistance to professional colleagues and membership activities and services.

National Coalition of Victims In Action ("NCVIA") is a component of the Renée Olubunmi Rondeau Peace Foundation. NCVIA's purpose is to encourage

victims of crime to become proactive for crime prevention and to support those victims already involved in order to bring enormous benefit to victims as well as to their communities. Members of the NCVIA come together as a national force to provide services to victims of crime and their families. NCVIA hopes thereby to raise public awareness of the effect of crime on victims and our communities, examine and support changes necessary to deal with the serious flaws in the criminal justice system, provide understanding and assistance to victims and survivors in recovery, and initiate programs related to the direct prevention of crime through long-term sustainable proposals and follow-up programs.

Families and Friends of Violent Crime Victims ("Families and Friends") was founded in Washington State in 1975 as a non-profit crime victim support and advocacy organization. Families and Friends is one of the oldest victim advocacy and support groups in the country and the only statewide organization that provides 24-hour support for victims of robbery, victims of identity theft, victims of aggravated assault, loved ones of homicide victims and families of adults who are missing where foul play is suspected. Family and Friends' goals include examining the criminal justice system, giving assistance to families and friends of victims during times of grief, and educating the public on the impact violent crime has in our society.

National Organization of Parents of Murdered Children, Inc. ("POMC®") is a victims' rights organization that provides the on-going emotional support needed to help parents and other survivors facilitate the reconstruction of a "new life" and to promote a healthy resolution. Not only does POMC help survivors deal with their acute grief but it also helps these survivors successfully interact with the criminal justice system. POMC makes the difference through continuing emotional support, education, prevention, advocacy and awareness. POMC provides support and assistance to all survivors of homicide victims while working to create a world free of murder.

Central Minnesota Chapter of Parents of Murdered Children, Inc. provides an increased awareness for prevention and aftermath of murder. It offers victim help groups where survivors may discuss their stories and find assistance for how to cope with their grief.

Greater Cincinnati Area Chapter of Parents of Murdered Children, Inc. provides support and assistance to survivors of murdered children. Members help one another by sharing experiences, feelings and insights and by allowing others to do the same.

Houston, Texas Chapter of Parents of Murdered Children, Inc. is a branch of the nation's only nonprofit self-help organization designed to provide support and assistance to all survivors of homicide

victims while working to create a world free of murder.

Northwestern Pennsylvania Chapter of Parents of Murdered Children, Inc. is a support group that supplies information about the grief process, provides emotional support to bereaved survivors and works to prevent the parole of violent criminals.

Southwest Louisiana Chapter of Parents of Murdered Children, Inc. is a self-help support group for the families and friends of those who have died by violence. It seeks to bring public awareness to the devastation that murder leaves in its wake.

Utah Chapter of Parents of Murdered Children, Inc. is a statewide non-profit organization that provides on-going emotional support, education, prevention, advocacy and awareness for victims of violent crime.

Association of Prosecuting Attorneys ("APA") is a national "think tank" that represents prosecutors and provides them with additional resources such as training and technical assistance. APA's goal is to develop proactive innovative prosecutorial practices that prevent crime, ensure equal justice and make our communities safer.

The Ben Doran Foundation ("Foundation") addresses the legislature, stands with crime victims' families and ensures no one forgets loved ones lost to the unimaginable horror of murder. The Foundation was created to speak up and speak out about crime

victims' rights and to address the many societal issues that lend themselves to murder and homicide. The Foundation is constantly forming new relationships with community non-profit leaders, law enforcement, legislators and the beautiful people who support it.

Survivors in Action, Inc. ("SIA") is a non-profit national advocacy group that supports victims and the families of victims of any crime, including domestic violence, identity theft, elder abuse, cyberstalking, child abuse, rape and sexual assault. Other national organizations typically help victims at specific points in the victimization cycle – such as when they first report the crime or in writing parole opposition letters – leaving "gaps" in needed services. SIA is the only organization that fills the support gaps for victims, providing guidance through all stages of the journey from victim to survivor, with no time limitations, cut-off dates or conditions. SIA's mission is to ensure that no victim anywhere in the nation is left behind.

Citizens Against Homicide ("CAH") is a non-profit organization in which the majority of Board members have lost a family member to murder, are surviving the devastating loss of a loved one, and are continuing to suffer the emotional trauma of coping with the criminal justice system. The members have joined together to create a body of support and a voice for the survivors and friends of murder victims.

Justice for All ("JFA") is an all-volunteer, non-profit organization founded in 1993. JFA advocates for change in a criminal justice system that is inadequate in protecting the lives and property of law-abiding citizens. Through private citizen and corporate membership, JFA will peacefully exert the social and legislative influence necessary to effect positive change in the criminal justice system.

Crime Victims Action Alliance ("CVAA") is a non-profit social welfare organization that promotes victims' rights and public safety. CVAA aggressively advocates for better laws, regulations and policies, actively supports public officials who respect and endorse the rights of victims of violent crime and holds accountable those who have been entrusted to ensure public safety.

Arizona Voice for Crime Victims is a victims' advocacy organization which ensures crime victims receive their rights to justice, due process and dignified treatment throughout the criminal justice process. Through five separate categories of activities, including educational programs and crisis response training programs, Arizona Voice for Crime Victims seeks to establish a compassionate justice system in which crime victims are informed of their rights, fully understand their rights, know how to assert their rights, have a meaningful way to enforce their rights, and know how to seek immediate crisis intervention when they become victims of crime.

Worldwide Sensible Sentencing Organization ("WWSSO") is a voluntary international organization that supports and advocates for victims of violent crime and for common sense public safety measures that would incarcerate violently dangerous offenders for sentences proportionate to their crimes.

Witness Justice is a national, grassroots, non-profit organization providing support and advocacy for survivors of violence and trauma. Founded in 2002, its mission is to empower and assist victims of violence and their loved ones in healing from trauma and in navigating the criminal justice process. Each month, Witness Justice receives more than 150,000 hits on its website and approximately 300 individuals turn to it for direct assistance, making it one of the most sought-after victim service providers in the country. Witness Justice provides information and support from its expert corps of volunteers, connection through its virtual community, training resources for service providers, and direct assistance to any survivor who may have questions in the aftermath of violence. When necessary, Witness Justice advocates with legislators, state systems, and other organizations to foster positive social change that will provide the best potential for survivors' healing and justice.

Crime Victims United of California ("CVUC") is a non-partisan, non-profit organization dedicated solely to protecting the rights of victims. CVUC's mission is to restore and maintain balance in California's criminal justice system, which for too long has put

criminals' rights ahead of victims' rights. CVUC is the only organization of its kind in California using education, legislative advocacy and political action to enhance public safety, promote effective crime-reduction measures and strengthen the rights of crime victims.

Crime Victims United of Oregon ("CVU") was founded in 1983 to advance the rights of crime victims and enhance the safety of all law-abiding Oregonians by addressing problems in Oregon's criminal justice system. CVU's mission is to promote a more balanced justice system through legislative action and public awareness. Through the tireless efforts of many volunteers, most of them victims of violent crime, much progress has been made toward fulfilling our mission. CVU's philosophy is that the laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions, and reformation.

IllinoisVictims.org is the only statewide victims' rights organization in Illinois. The organization acts as a watchdog over issues pertaining to victims of violent crime in the state of Illinois, especially in government and legislation. IllinoisVictims.org is an information clearinghouse and resource network of support for all victims of violent crime in Illinois, with a special focus on homicide victims.

LIFESENTENCE is a victims' rights organization with a goal of educating youth, parents and the public about the effects of violence. Through its presentation on choices, LifeSentence shares our own

real life stories in a very graphic and powerful way. LifeSentence brings the reality of violent crime to the youth of today in a way that they can understand – through a mother's heart.

Victims Voices Heard is a non-profit advocacy organization committed to assisting all victims and survivors of crime. The organization advocates for all victims as they seek to find the answers that will enable them to feel empowered and move forward with their lives. It provides a dialogue program that offers victims and victims' survivors of violent crimes the opportunity to meet with their offender face-to-face in order to facilitate the healing recovery process. It acts as an advocate on behalf of the victim, helping them through the process and arranging a safe and secure environment for the meeting to take place.

3 Strikes is a non-profit organization that strives to keep violent and serious repeat offenders behind bars. The organization tracks and posts on the Internet related data for public access studies and statistics pertinent to crime in general and to 3 Strikes in particular. It was the author of California's 3 Strikes and You're Out Law, Proposition 184.

You Have the Power . . . Know How to Use It, Inc. is a non-profit agency created in 1993 in the State of Tennessee as a volunteer, grassroots effort composed of concerned citizens, crime survivors, and representatives from the office of the district attorney, law enforcement and community agencies. The organization is dedicated to raising awareness about crime

and justice issues. Its goal is to prevent violent crime and reduce victimization. It conducts educational programs, creates documentary videos, and produces practice resource books on topics such as domestic violence, elder abuse, methamphetamine, and child sexual abuse.

The Renée Olubunmi Rondeau Peace Foundation (RORPF) works to promote awareness on the part of the American public as to the magnitude of the crime problem and to individual and collective responsibility for the solution. RORPF seeks to accomplish its mission by involvement in three areas: Direct Service to crime victims through the National Coalition of Victims in Action; Educational Support through the Renée Olubunmi Rondeau Memorial Scholarship Fund; and Advocacy through Action Americans: Murder Must End Now! (AAMMEN!).

S.T.E.V.I.E. SUPPORT (Striving Towards Eradicating Violence in Ennercities) is a non-profit victims organization. Its mission is to mobilize, educate, empower, and assist survivors of homicides as to the social ills of the public health epidemic of violence. The organization seeks to put in place the necessary mechanisms by which lives will be saved and restored and communities can and will be reclaimed.

Justice for Homicide Victims ("JHV") provides support to victims who fight for their rights and to be the champion of the legal rights of survivors of homicide victims by providing them information about victim rights in all aspects of the criminal justice

system. JHV seeks to educate the public as to the injustices in the present system of criminal justice in California. Only when the people are aware of the facts can change and reform be accomplished.

SUMMARY OF ARGUMENT

Despite numerous advancements in the criminal justice system, crime victims[2] remain second-class citizens. Today, this Court is being asked to engage in a callous bait-and-switch by improperly extending its decision in *Roper v. Simmons*[3] to declare that life without parole for violent juveniles offends the Eighth Amendment. We urge this Court to remain faithful to the Constitution of the United States and its own jurisprudence, which clearly differentiates between the sentence of death and all others, including life without parole.

An overwhelming national consensus exists that a life without parole sentence is appropriate and constitutional for juvenile offenders who show an exceptional disregard for human life. Courts, legislatures, and American people have strongly approved of these sentences as an effective and lawful device to deter juvenile crime and protect law-abiding citizens.

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[2] The word "victim" throughout this brief is intended to include the actual victim as well as the victim's family.

[3] 543 U.S. 551 (2005).

These institutions understand that violent crimes are no less traumatizing to victims because the offenders are underage. A criminal justice system which categorically denies constitutional and proper sentences for juvenile offenders perpetuates no justice at all.

ARGUMENT

I. TO ABOLISH THE LIFE WITHOUT PAROLE SENTENCE FOR JUVENILE OFFENDERS ON THE HEELS OF *ROPER* WOULD BE A BAIT-AND-SWITCH VIOLATIVE OF THE HARD-WON RIGHTS OF VICTIMS.

For most of American history,[4] the criminal and juvenile justice systems failed to acknowledge a role for victims. Conventional thought held an "assumption that crime victims should behave like good

[4] At the birth of our country, crime victims were solely responsible for investigating and prosecuting the crimes committed against them. As society increasingly realized it had an interest in ensuring crimes were prosecuted, and prosecuted fairly, a new system emerged that coupled private prosecution with public prosecutors. Once governments appointed public prosecutors, however, private prosecution became increasingly rare and eventually nonexistent. This newly created process resulted in the unintentional exclusion of crime victims. Joanna Tucker Davis, *The Grassroots Beginnings of the Victims' Rights Movement*, Nat'l Crime Victim Law Inst. (2004), *available at* http://www.ncvli.org/objects/ReportingCrime.pdf (last visited Sept. 17, 2009).

Victorian children – seen but not heard."[5] More than 30 years ago, however, this Court catalyzed the Modern Crime Victims' Rights Movement, which finally gave the innocent a voice. In *Linda R. S. v. Richard D.*,[6] this Court denied a crime victim's right to compel a criminal prosecution because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[7] This Court then suggested that Congress "may enact statutes creating legal rights, the invasion of which [would] create standing" for a crime victim.[8]

In the early 1980s, President Ronald Reagan, in response to a national outcry for fundamental victims' rights, appointed the President's Task Force on Victims of Crime ("Task Force"). The President directed the Task Force to assess the treatment of crime victims in the criminal justice system.[9] The Task Force members were unanimous in their many findings: "The innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds – personal, emotional and financial – have gone unattended."[10] The Task Force

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[5] *Kenna v. U.S. Dist. Ct. for the Ctr. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2000).

[6] 410 U.S. 614 (1972).

[7] *Id.* at 619.

[8] *Id.* at 616, n.3.

[9] President's Task Force on Victims of Crime, *Final Report*, Washington, D.C.: U.S. Government Printing Office, Dec. 1982.

[10] *Id.* at ii.

found poor treatment of crime victims more widespread than it had expected and that "somewhere along the way the system ha[d] lost track of the simple truth that it is supposed to be fair and protect those who obey the law while punishing those who break it."[11] The Task Force recommended sweeping changes, aimed at restoring balance to the skewed criminal justice system. These recommendations implicated every segment of government and society: federal, state and local governments as well as the private sector.[12]

The response to the irrefutable evidence that the criminal justice system had systematically denied victims' rights was overwhelming. The growing recognition of the plight of victims – aided by the Court's suggestion and the Task Force's report – led to profound reforms in the adult system. Within 10 years, every state had enacted statutory rights for crime victims and many adopted constitutional amendments protecting victims' rights.[13] As of today, all states have adopted a statutory crime victims' bill of rights and 33 states have passed constitutional amendments that guarantee rights for crime victims.[14] In the federal system, Congress passed the

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[11] *Id.* at vi.

[12] *Id.* at ii.

[13] Dean G. Kilpatrick *et al.*, Office of Justice Programs, *The Rights of Crime Victims – Does Legal Protection Make a Difference?*, U.S. Dep't of Justice, Dec. 1998, *available at* http://www.ncjrs.gov/pdffiles/173839.pdf (last visited Sept. 17, 2009).

[14] *Id.*

Victim and Witness Protection Act of 1982,[15] its purpose is "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the federal government does all that is possible to assist victims and witnesses of crime . . . , and to provide model legislation for state and local governments." In 1990, Congress continued its robust endorsement of victims' rights by enacting the first federal bill of rights for victims of crime – the Victim's Rights and Restitution Act of 1990.[16] Finally, Congress passed the Crime Victims' Rights Act of 2004,[17] which significantly expanded the rights of crime victims for crimes committed by adults and provided specific enforcement mechanisms and placed a duty on the federal courts to ensure victims are afforded these rights.

Despite these hard-won and deserved advances in victims' rights, the criminal justice system still routinely denies victims their rights of involvement and participation. Studies continue to highlight the re-victimizing and re-traumatizing of victims the

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[15] 18 U.S.C. §§ 1512-1515 (1982).

[16] 42 U.S.C. §§ 10606-10607 (1990).

[17] 18 U.S.C. § 3771 (2004). The definition of "victim" in section 3771(e) of the Crime Victims' Rights Act of 2004 (CVRA) is not limited to victims of adult offenders; thus, it seems that victims of juvenile offenders also possess these explicit rights. A current federal court case, *United States v. L.M.*, 425 F.Supp. 2d 948 (Iowa N.D. 2006), confronted the issue of whether the CVRA applies to juvenile proceedings and concluded that these rights do attach to victims of juvenile offenders so long as the proceedings are considered public.

criminal justice system imposes. One study found many victims abandon pursuing criminal charges due to the torment of dealing with a system that either ignores them outright or treats them as second-class citizens.[18] These victims feel helpless, as if the system designed to protect and advocate for them, instead abandons them. Further, victims perceive that those in the system – prosecutors, defense attorneys, and judges – appear to not care about them or the crimes committed against them.[19] Another study found nearly one-third of victims interviewed would not get involved again with the criminal justice system.[20] This latter study is alarming because, as the Task Force stated, "[w]ithout the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold criminals accountable."[21]

Unfortunately, state juvenile justice systems still lack many of the hard-fought reforms achieved in the adult system. For example, only 13 of the 45 states that enacted some form of victims' rights legislation by 1988 specifically included victims of juvenile

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[18] Robert Elias, *Victims of the System* 109 (Transaction Books Brunswick, NJ 1983).

[19] *Id.*

[20] *Id.* at 132.

[21] President's Task Force on Victims of Crime, *supra* n.7, at vi.

offenders.[22] Only half the states have enacted comprehensive notification and participatory rights for victims of serious juvenile offenses. Moreover, those states only allow the victim to be notified or attend hearings if the case involves an offense considered a felony if perpetrated by an adult.[23] In addition, enforcement problems have rendered ineffective some recent on-point legislation. After an in-depth review of victims' rights within the juvenile justice system, the National Victim Center reported "most of the rights for victims of juvenile offenders should more accurately be called suggestions, or recommendations, as they are only advisory in nature."[24] Thus, victims of juvenile offenders have not experienced the same advancements of protection of rights as victims of adult offenders – this means the criminal justice system treats victims of the same or similar crimes vastly different solely due to the perpetrator's age.

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[22] David Beatty *et al.*, Office of Justice Programs, *New Directions from the Field: Victims' Rights and Services for the 21st Century*, U.S. Dep't of Justice, 1997, at 7, *available at* http://www.ojp.usdoj.gov/ovc/new/directions/pdftxt/direct.pdf (last visited Sept. 17, 2009).

[23] *Id.*

[24] *1996 Victims' Rights Sourcebook: A Compilation and Comparison of Victims' Rights Laws, Nat'l Victim Ctr.*, 1997, § 13.

The *Roper* opinion abolished the death sentence for juveniles; however, the Court then immediately and unambiguously approved of the life without parole sentence for juveniles. The Court reasoned this substitute would sufficiently serve as a deterrent, one of the death penalty's "two distinct social purposes."[25] This Court stated "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[26] Thus, this Court relied on the availability and constitutionality of life without parole for juvenile offenders for its conclusion the death sentence for juveniles violates the Eighth Amendment. To hold contrary now, a mere four years later, would be an egregious bait-and-switch that re-victimizes and re-traumatizes innocent victims who deserve consistency and finality of the law.

This is not an issue of innocence; juries found these offenders guilty in a court of law. Moreover, judges determined appropriately severe sentences for them, taking into account the exceptionally cruel acts and callous disregard of human life these offenders demonstrated. After enduring arduous trials, the criminal justice system promised victims their offenders would never be released. Now petitioner's request

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[25] *Roper*, 543 U.S. at 571.

[26] *Id.* at 572.

threatens victims with the real possibility they will have to endure trying the case over and over in parole hearings for the rest of their lives, and possibly even their children's lives. In many instances, the crimes committed by juveniles who received life without parole occurred many years ago, even decades. To now subject victims to regular parole hearings with their offenders would be unjust and unfairly burdensome – evidence may have been lost or misplaced, memories have faded, and witnesses have either died or relocated. To reopen final sentences and require victims to regularly engage with their offenders in parole hearings would serve only to transfer the life sentences from the guilty offenders to the innocent victims.

This Court is asked to retroactively deny legislatures, courts, and society the right to enforce sentences of life without parole against violent juvenile offenders. Any such decision would result in a callous bait-and-switch that would necessarily be an affront to victims. The criminal justice system promised these victims, and this Court affirmed in *Roper* that their offenders would never be released. To deny victims the finality of the law and the opportunity to recover from the horror and cruelty of the violence perpetrated against them would be a merciless swindle.

II. THE OVERWHELMING NATIONAL CONSENSUS IS THAT JUVENILE LIFE WITHOUT PAROLE IS APPROPRIATE AND CONSTITUTIONAL IN LIMITED CASES.

Every state and federal appellate court that has confronted the constitutionality of juvenile life without parole has upheld this rare sentence.[27] And

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[27] *See, e.g., Calderon v. Schribner*, No. 2:06-cv-00770-TMB, 2009 WL 89279, *4-6 (E.D. Cal. Jan. 12, 2009) (upholding life sentence without parole for a 17-year-old convicted of kidnapping for ransom with bodily injury, but not death); *Culpepper v. State*, 971 So. 2d 259 (Fla. Dist. Ct. App. 2008), *cert. denied*, 981 So. 2d 1199 (Fla. 2008) (holding that *Roper* does not provide basis for claim that mandatory life without parole imposed on 14-year-old for murder violates the Eighth Amendment); *Tate v. State*, 864 So. 2d 44 (Fla. Dist. Ct. App. 2003) (finding no Eighth Amendment violation from imposition of mandatory life sentence on 12-year-old for murder of six-year-old); *Phillips v. State*, 807 So. 2d 713 (Fla. Dist. Ct. App. 2002) (holding life without parole imposed on 14-year-old for murder of eight-year-old not violative of the Eighth Amendment); *People v. Cooks*, 648 N.E.2d 190 (Ill. Ct. App. 1995) (holding mandatory life sentence given to 14-year-old for double murder did not violate Eighth Amendment); *People v. Bentley*, No. 214170, 2000 WL 33519653 (Mich. Ct. App. Apr. 11, 2000) (finding 14-year-old murderer's mandatory non-parolable life sentence did not violate state or federal prohibition against cruel and unusual punishment); *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008) (upholding life sentence without parole for a 15-year-old convicted of kidnapping and forcibly raping a nine-year-old victim over two months); *State v. Jensen*, 579 N.W.2d 613 (S.D. 1998) (holding life sentence given to 14-year-old who murdered cab driver was not grossly disproportionate); *State v. Howell*, 34 S.W.3d 484 (Tenn. Crim. App. 2000) (holding natural-life sentence for 14-year-old did not violate the state and constitutional prohibitions on cruel and unusual punishment); *State v. Loukaitis*, 1999 WL 1044203

(Continued on following page)

despite the vast amount of resources expended by advocacy groups on behalf of juvenile perpetrators, only two states, Texas and Colorado, have passed any legislation reforming juvenile life without parole sentences.[28] Yet both states apply the revised juvenile sentences prospectively, and Colorado still requires

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(Wash. Ct. App. 1999) (finding Eighth Amendment analysis not necessary where 14-year-old given life without parole for murdering a teacher and two students and wounding another); *State v. Massey*, 803 P.2d 340 (Wash. Ct. App. 1990) (finding natural life sentence given to 13-year-old for murder did not violate the Eighth Amendment). *But see Naovarath v. State*, 779 P.2d 944 (Nev. 1989) (relying on the Nevada Constitution and the Eighth Amendment to the U.S. Constitution to strike down a sentence of life without parole imposed on a 13-year-old who had been molested by the man he killed); *In re Nunez*, 173 Cal. App. 4th 709 (Ct. App. 4th Dist. 2009) (vacating a sentence of life without parole imposed on an offender who committed a kidnapping when he was 14 years old on the grounds that the sentence was disproportionate compared to the penalty for murder and therefore "serves no valid penological purpose"). While *Naovarath* and *Nunez* each upset a sentence of life without parole, neither called into question the constitutionality of the sentence as applied to juvenile offenders.

[28] The other states include California, Michigan, Nebraska, Florida, Washington, and Louisiana. Claudia Rowe, *A Look at Why State Teens Can Get Life Without Parole*, Seattle Post-Intelligencer, Feb. 5, 2009, at A1. Similar legislation has been introduced at least twice at the federal level. Juvenile Justice Accountability and Improvement Act of 2009, H.R. 2289, 110th Cong. (2009); Juvenile Justice Accountability and Improvement Act of 2007, H.R. 4300, 109th Cong. (2007). The 2007 bill attracted only two supporters out of the 435-member House of Representatives. The more recent bill has attracted no more support.

juvenile offenders to serve a minimum of 40 years before they receive their first parole review.[29]

In other states where legislatures have introduced bills to end or moderate life without parole sentences for juveniles, the legislation[30] either languishes or is quickly defeated outright, presumably because no public support exists to change a law that would release violent offenders solely due to their age at the time they committed their crime. The courts, legislatures, and citizens have overwhelmingly approved the availability of the life without parole sentence for juveniles. Thus, any decision contrary to this express will would not only be an affront to all

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[29] Colo. Rev. Stat. § 17-22.5-104(d)(IV) (2006); S.B. 839, 81st Leg., Reg. Sess. (Tex. 2009) (passed in both House and Senate, May, 2009).

[30] For example, legislation in California that would ban juvenile life without parole sentences recently failed a vote in Committee. *Committee Strikes Down Fair Sentencing for Youth Act*, Calif. Chron., July 2, 2009, *available at* http://www.californiachronicle.com/articles/view/108384 (last visited Sept. 17, 2009). The key sponsor in an Illinois measure to abolish juvenile life without parole has backed off stating that more dialogue is needed between the juvenile advocates and the victims. Amanda Paulson, *States Reconsider Life Behind Bars for Youth*, Christ. Sci. Mon., March 12, 2008. Also, the Michigan legislation to end juvenile life without parole sentences "remains stalled in the Senate Judiciary Committee." Eartha Jane Melzer, *As Bill to Ban Life Imprisonment for Children Languishes, Inequities of Defense Persist*, Mich. Messenger, April 13, 2009 *available at* http://michiganmessenger.com/16689/as-bill-to-ban-life-imprisonment-for-children-languishes-inequities-of-defense-persist (last visited Sept. 17, 2009).

crime victims but also to the country's law-abiding public.

III. UPHOLDING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS ESSENTIAL FOR THE PROTECTION OF AMERICA'S LAW-ABIDING CITIZENS, PARTICULARLY ITS INNOCENT CHILDREN.

The United States has the worst juvenile crime rate in the Western world and ranks third in the world in the number of murders committed by juveniles.[31] In 2003, 15 percent of male arrests and 20 percent of female arrests involved a person under 18.[32] Starting in the late 1980s and continuing into the 1990s, the Violent Crime Index arrest rate for juvenile offenders rose dramatically.[33] By 1994, the arrest rate of juvenile offenders for violent crimes had risen 61 percent above its 1988 level.[34] Yet this astonishing increase was not the only story – the seriousness and heinousness of juvenile crimes had

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[31] Charles D. Stimson & Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*, The Heritage Foundation, Aug. 2009, *available at* http://www.heritage.org/research/crime/upload/lwop.pdf#page=5 (last visited Sept. 17, 2009).

[32] Office of Justice Programs, *Juvenile Offenders and Victims: 2006 National Report*, U.S. Dep't of Justice (2006), at 126.

[33] *Id.* at 132.

[34] *Id.*

also intensified. During the period between 1987 and 1993, the juvenile arrest rate for murder increased 110 percent.[35] The juvenile arrest rate for forcible rape grew 44 percent between 1980 and 1991.[36]

The terrifying rise in juvenile violent crime prompted many states to pass legislation imposing harsher penalties and longer sentences; these new policies have proven overwhelmingly effective. Juvenile crime has decreased substantially since its peak in 1993.[37] According to the United States Department of Justice, the juvenile arrest rate for Violent Crime Index offenses fell 49 percent between 1994 and 2004, reaching its lowest level since at least 1980.[38] In 2006, the growth in the juvenile murder arrest rate was 73 percent below its 1993 peak.[39]

Despite the proven success of tougher accountability for juvenile offenders, a few advocacy groups are lobbying for a return to a juvenile justice system with ineffective and inappropriate penalties. These groups argue that 'children' should not be held fully accountable for their crimes and that the criminal justice system needs to protect juveniles from the

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[35] *Id.*

[36] *Id.*

[37] Howard N. Snyder, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2006,* U.S. Dep't of Justice, Nov. 2008, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/221338.pdf (last visited Sept. 17, 2009).

[38] *Id.*

[39] *Id.*

harsher aspects of the system. What these advocacy groups fail to acknowledge, is that softening sentences for juvenile offenders puts actual children in harm's way – innocent ones, not those who have committed violent crimes. About 62 percent of victims of nonfatal violence committed by juvenile offenders were themselves under 18.[40] Children make up 95 percent of the victims of sexual assaults committed by juveniles.[41] Juvenile offenders committed about 1 in 2 violent offenses against children; only 1 in 10 violent offenses against adults were committed by a juvenile offender.[42]

IV. THE CONSTITUTIONAL JUVENILE LIFE WITHOUT PAROLE SENTENCE IS A NECESSARY AND EFFECTIVE TOOL WITHIN THE CRIMINAL JUSTICE SYSTEM.

The *amici* do not oppose the juvenile justice system in general. The criminal justice system appropriately affords juvenile offenders extra layers of legal protection for a variety of socially significant reasons. Most states already have processes in place that review and evaluate appropriate charges and channels of prosecution that look to the individual facts of each case.

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[40] Office of Justice Programs, *Victims of Violent Juvenile Crime*, U.S. Dep't of Justice (July 2004).

[41] *Id.*

[42] *Id.*

Although most juvenile offenders should not and do not have their cases adjudicated in the adult criminal justice system, the legislatures, the courts and the American people recognize limited exceptions for particularly heinous offenses. In 2005, juvenile courts transferred less than 1 percent of cases to the adult system.[43] These cases represented the very worst acts perpetrated on other human beings and call for adjudication in courts appropriate for the crime.

The *amici* are not advocating for a more broad application of the life without parole sentence for juvenile offenders; courts should use it sparingly, as is currently the case. But the life without parole sentence is an effective sentence for the worst juvenile offenders and thus has a place in the nation's criminal justice system. At a minimum, the Court should affirm its decision in *Roper*, which allows states to enact legislation to manage the life without parole process for juvenile offenders and, indeed, the juvenile justice system as the constitutionally empowered state law makers decide.

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[43] Office of Justice Programs, *Delinquency Cases Waived to Criminal Court, 2005*, U.S. Dep't of Justice (June 2009).

CONCLUSION

Since *Roper*, advocacy groups have pursued an intense national campaign to eliminate or moderate life without parole sentences for juveniles. Unfortunately, these groups have often presented inaccurate portraits of the offenders and their offenses that misinform the public policy discussion. Advocacy groups have expended significant resources on convicted juveniles, most of whom are guilty and often unrepentant of cruel and aggravated offenses. The victims, however, are all too often left feeling discarded and insulted by the system formed to protect them. When debate arises about perpetrators' sentences, victims are often treated like unwelcome interlopers. Yet, their perspective is central to the discussion because there would be no crime, sentence or debate without first the innocent victims. Thus, any sweeping, retroactive legal decision which does not first take into account the interests of victims, would only serve to re-victimize the very people this system is designed to protect.

The petitioners are asking this Court to further restrict victims' rights to hold juvenile offenders accountable for heinous crimes and to require these devastated victims to be re-traumatized in constant legal reengagement with the offenders in unending parole hearings. This only serves to transfer the life sentence from the culpable offender to the innocent victim.

The *amici* are hopeful this Court will continue to affirm legal finality for traumatized victims who will never forget the depth of the horrors committed against the victims by these juvenile offenders. The life without parole sentence for juveniles is appropriately rare and reserved only for the worst of the worst offenders. The *amici* ask this Court to follow its reasoning in *Roper* and uphold the constitutionality of the life without parole sentence for violent juvenile offenders.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM
Petitioner,

v.

FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,

v.

FLORIDA,
Respondent.

On Writs of Certiorari to the District Court of Appeal of Florida, First District

BRIEF OF THE SENTENCING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. SENTENCING JUVENILES TO LIFE WITHOUT PAROLE IS CONTRARY TO THIS COURT'S FINDING IN *ROPER* THAT THEY ARE FUNDAMENTALLY DIFFERENT THAN ADULTS 5

A. In Light Of Their Diminished Culpability, Juveniles Should Not Be Subjected To The Severe Sanction Of Life Without Parole 5

B. Sentencing Juveniles To Life Without Parole Denies Their Unique Potential For Reform 8

II. LIFE WITHOUT PAROLE IS OFTEN IMPOSED ON JUVENILES WITHOUT ANY CONSIDERATION OF THEIR DIMINISHED CULPABILITY 14

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 3

Claiborne v. United States,
551 U.S. 87 (2007) 1

Eddings v. Oklahoma,
455 U.S. 104 (1982) 5

Enmund v. Florida,
458 U.S. 782 (1982) 3, 7

Hampton v. Kentucky,
666 S.W.2d 737 (Ky. 1984) 3, 14

Harmelin v. Michigan,
501 U.S. 957 (1991) 10, 15

In re Gault,
387 U.S. 1 (1967) 9

Johnson v. Texas,
509 U.S. 350 (1993) 10

Kimbrough v. United States,
552 U.S. 85 (2007) 1

Naovarath v. State,
779 P.2d 944 (Nev. 1989) 5, 11

Roper v. Simmons,
543 U.S. 551 (2005) ..... passim

Solem v. Helm,
463 U.S. 277 (1983) 8, 10

Thompson v. Oklahoma,
487 U.S. 815 (1988) 3, 5, 9

Workman v. Commonwealth,
429 S.W.2d 374 (Ky. 1968) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

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Ark. Code Ann. § 9-27-318 18
Conn. Gen. Stat. § 46b-127 19
Fla. Stat. § 985.557 18
705 Ill. Comp. Stat. § 405/5-130 21
720 Ill. Comp. Stat. § 5/5-2 21
730 Ill. Comp. Stat. § 5/5-8-1 22
Mich. Comp. Laws § 600.606 18

OTHER AUTHORITIES

Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf 7

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BRIEF OF THE SENTENCING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of the Sentencing Project as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, and promotes cost-effective and humane responses to crime. The Sentencing Project has filed *amicus curiae* briefs in prior sentencing cases before this Court, including *Kimbrough v. United States*, 552 U.S. 85 (2007) (addressing lack of empirical basis for Guidelines sentences in crack-cocaine cases), *Claiborne v. United States*, 551 U.S. 87 (2007), and *Roper v. Simmons*, 543 U.S. 551 (2005).

The Sentencing Project has also produced a broad range of scholarship on the sentencing of juveniles to life without parole and related topics, such as the transfer of juveniles into the adult criminal system. Members of its staff have been invited to present tes-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

timony on juvenile life without parole before Congress, state legislatures, and professional audiences, and have testified on legislative reform proposals before the House Judiciary Committee.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Florida and other states, juveniles – sometimes as young as 13 or 14 at the time of their offense – are serving life sentences without the possibility of parole. In some cases, they are serving these sentences for offenses in which no homicide was committed, or in cases in which they acted as an accomplice for an older, more culpable defendant's crime. And in many cases, juveniles are serving life-without-parole sentences that are effectively mandatory, rather than the result of careful and individualized sentencing decisions. State law frequently requires both that these juvenile offenders be tried as adults and that, upon conviction, they be sentenced to life without parole, meaning that no judge or jury ever considered whether the juvenile's age or culpability potentially warranted a lesser sentence.

These sentences violate the Eighth Amendment's prohibition on cruel and unusual punishment. The Eighth Amendment is grounded in the "basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (citations and quotation marks omitted). Whether a particular penalty comports with this proportionality requirement depends in large part on the culpability of the offender – a factor that has motivated this Court's rejection of disproportionate penalties in a variety of

circumstances. *See, e.g.*, *Roper*, 543 U.S. at 569-70; *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982).

Nowhere is the question of a defendant's culpability more relevant than in sentences involving juvenile offenders, whom this Court has long recognized are less blameworthy than adults who commit similar crimes. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult") (plurality op.). In particular, juveniles lack the same maturity as adults, are more susceptible to negative influences, and possess a greater capacity for reform over time. *Roper*, 543 U.S. at 569-70. This Court has determined that because of these "marked and well understood" differences between juveniles and adults, *id.* at 572-73, the Eighth Amendment prohibits imposition of the death penalty on offenders under the age of 18, *id.* at 578.

That same reasoning applies with equal force to sentences of life without parole for juvenile offenders. Life without parole, "like death, is a sentence different in quality and character from a sentence to a term of years subject to parole," *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984) – and its imposition runs counter to this Court's conclusion that juveniles cannot be classified "among the worst offenders," *Roper*, 543 U.S. at 570. Indeed, life without parole not only condemns juveniles to a sentence that reflects a determination that they can never be rehabilitated, it removes incentives for good behavior by making it effectively impossible in many cases for

juveniles to access rehabilitative services that are in practice reserved for offenders with lesser sentences.

It is no answer to the Eighth Amendment problem to say that individual judges and juries are in the best position to make case-by-case decisions about which juvenile offenders deserve a life-without-parole sentence. Unlike the sentence this Court considered in *Roper*, life without parole is often imposed on juveniles without any individualized consideration of their diminished culpability. Before *Roper*'s categorical ban on the sentence, the death penalty could only be imposed on a juvenile after a judge or jury considered his culpability. *See Roper*, 543 U.S. at 602-03 (O'Connor, J., dissenting). In the context of life without parole, however, such individualized consideration is frequently unavailable or even impossible. Mandatory transfer and mandatory sentencing laws, whose use has expanded dramatically over the past two decades, create a perfect storm for juvenile offenders: They require that juveniles be tried in the adult system and, upon conviction, mandate a sentence of life without parole. Together, these laws deny many juveniles any opportunity to have their age, home environment, history of abuse, and other factors related to their culpability considered at any stage of the proceedings against them.

For these reasons, the Eighth Amendment prohibits the imposition of life without parole on juvenile offenders. The judgments below should be reversed.

ARGUMENT

I. SENTENCING JUVENILES TO LIFE WITHOUT PAROLE IS CONTRARY TO THIS COURT'S FINDING IN *ROPER* THAT THEY ARE FUNDAMENTALLY DIFFERENT THAN ADULTS

Because of their diminished culpability – recognized by this Court, demonstrated by science, and underscored by sentencing practices – juveniles cannot be classified among the worst offenders. Rather, "juveniles have a greater claim than adults to be forgiven" when they commit crimes. *Roper*, 543 U.S. at 570; *see also Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (juvenile life without parole is excessive "given the undeniably lesser culpability of children for their bad actions"). Sentencing juveniles to life without parole ignores this diminished culpability and, like the death penalty, wholly denies their unique potential for rehabilitation.

A. In Light Of Their Diminished Culpability, Juveniles Should Not Be Subjected To The Severe Sanction Of Life Without Parole

This Court has long recognized that juveniles, because of their young age and diminished culpability, cannot be considered among the worst offenders. *See Thompson*, 487 U.S. at 835 (juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult"); *Eddings v. Oklahoma*, 455 U.S. 104, 116 & n.11 (1982). This diminished culpability flows from three well-established differences between juveniles and adults: Juveniles are less mature and more

likely than adults to act recklessly; they are more susceptible to negative influences and peer pressure; and their character traits are less firmly-fixed than those of adults. *Roper*, 543 U.S. at 569-70.

As scientists have widely documented, these behavioral differences reflect differences between the juvenile and adult brain. Brain imaging research (using Magnetic Resonance Imaging and other techniques) has provided new information about the degree to which juvenile and adult brains differ – and how these differences increase juveniles' aggression and risk-taking behavior while diminishing their judgment and ability to control impulses. *See generally* Brief of American Medical Association et al. as *Amici Curiae* Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) (synthesizing scientific literature). To take only one important example, adolescent brains are more active in areas related to aggression and anger, and are not fully developed in areas that control reasoning, risk taking, and impulse control. *Id.*

Sentencing trends confirm that juveniles serving life without parole are not the most culpable offenders. The present cases illustrate that fact. Here, both petitioners were sentenced to life without parole for non-homicide offenses: Terrance Graham, a first-time offender, received the sentence for a probation violation and underlying charges of armed burglary and attempted armed robbery, Cert. Pet. 2, *Graham v. Florida*; Joe Sullivan was sentenced to

life without parole after being convicted of sexual battery, Cert. Pet. 3, *Sullivan v. Florida*.[2]

Even in those cases in which loss of life occurs, life without parole – the most severe penalty to which juveniles may be subjected – is frequently imposed on juvenile offenders who did not intend to cause harm, even though "[i]t is fundamental that causing harm intentionally must be punished more severely than causing the same harm unintentionally." *Enmund*, 458 U.S. at 798. More than a quarter of juveniles serving life without parole were convicted of felony-murder – a crime in which the juvenile offenders did not intend to commit murder and may have been only minimally involved. *See* Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 27 (2005), *available at* http://www.hrw.reports/2005/us1005/TheRestofTheirLives.pdf. In other cases, juveniles have been sentenced to life without parole for aiding and abetting homicides committed by other persons. *Id.* at 28 (nearly half of juveniles sentenced to life without parole in Michigan were convicted of felony murder or aiding and abetting); *see also* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable* 11 (2008), *available at*

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[2] Florida – which has sentenced juveniles to life without parole for offenses including burglary, carjacking, and battery – appears uniquely out of step with other states when it comes to imposing the sentence for non-homicide offenses. *See* Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* 3 (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.

http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf (discussing Illinois' "accountability statute," which imposes severe sentences on accomplices). Juvenile offenders often have adult co-defendants who played a larger role in the crime yet, in some cases, receive a lesser sentence.

For example, one 16-year old – Patrick McLemore – was sentenced to life without parole in Michigan for aiding and abetting a murder his 20-year old accomplice committed. McLemore was not in the residence where the murder took place when it occurred, yet his co-defendant – who pled guilty – received a shorter sentence. *See* Ashley Nellis and Ryan S. King, The Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* 33 (2009), *available at* http://www.sentencingproject.org.

Nor has juvenile life without parole been reserved for recidivists. To the contrary, the majority of juveniles sentenced to life without parole – like Terrance Graham – are not chronic offenders. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 28. Indeed, 59 percent of juveniles serving life without parole received the sentence for their first criminal conviction, *id.* – even though society assigns greater culpability to habitual offenders, *see Solem v. Helm*, 463 U.S. 277, 296 (1983).

B. Sentencing Juveniles To Life Without Parole Denies Their Unique Potential For Reform

Life without parole not only ignores juveniles' diminished culpability; it extinguishes any possibility for rehabilitation, even though it is widely-

recognized that juveniles possess a unique capacity for reform. *See Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) ("it is *impossible* to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life") (emphasis added).

1. Precisely because the adolescent brain is not yet fully developed, juveniles possess character traits that are more transitory than those of adults and, accordingly, are more likely to change as they mature. *See* Gail B. Goodman, Comment, *Arrested Development: An Alternative To Juveniles Serving Life Sentences*, 78 U. Colo. L. Rev. 1059, 1082-83 (2007). This unique potential for reform has been accepted for a century; indeed, rehabilitation was the original cornerstone of the juvenile justice system, established at the turn of the Twentieth Century with a goal of reforming juvenile offenders and enabling their return as productive members of society. *See In re Gault*, 387 U.S. 1, 15-16 (1967); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. Rev. 1083, 1086-87 (2006).

For this reason, just as this Court has long acknowledged that juveniles are less culpable than adults, it has likewise recognized that they possess a greater capacity for reform. *Roper*, 543 U.S. at 570 ("it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed"); *see also Thompson*, 487 U.S. at 837 (acknowledging the "teenager's capacity for growth"). As the Court has explained, "the signature qualities

of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

This capacity for reform, in turn, counsels against imposing penalties on juveniles that utterly reject even the possibility of rehabilitation over the course of an offender's lifetime. The prospect of rehabilitation was thus an important factor in this Court's holding that juveniles cannot constitutionally be sentenced to death. *See Roper*, 543 U.S. at 573-74 ("When a juvenile offender commits a heinous crime . . . the State cannot extinguish his . . . potential to attain a mature understanding of his own humanity.").

This reasoning applies with equal force to juvenile life without parole. Life without parole – like the death penalty – ignores juvenile offenders' capacity for reform and entirely rejects the possibility of rehabilitation. *See Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J., dissenting) ("a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom . . . such a sentence does not even purport to serve a rehabilitative function").

A "regular part of the rehabilitative process," *Solem v. Helm*, 463 U.S. 277, 300 (1983), parole does not guarantee that juvenile offenders will be released; rather, it provides them with the opportunity to demonstrate their progress and rehabilitation at a parole hearing. *See* Nellis and King, *No Exit*, *supra*, at 30. By depriving juveniles of this basic opportu-

nity, a sentence of life without parole sends them the same stark message as the death penalty does: They are beyond redemption, and any attempt at rehabilitation is futile. *See Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989) ("Denial of [parole] means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [a juvenile], he will remain in prison for the rest of his days.").

2. This wholesale rejection of rehabilitation has a tangible impact on juveniles serving life sentences without parole. Federal laws, prison policies, and a lack of resources combine to deprive juveniles of educational opportunities and vocational training services available to other inmates. As a result, juveniles who want to reform themselves are often unable to do so.

Post-secondary education, for example, is effectively unavailable to juveniles sentenced to life without parole. A 1994 statute eliminated the availability of Pell Grants for inmates pursuing post-secondary education, *see* 20 U.S.C. § 1070a(b)(7); at present, federal assistance is limited to grants to prisons to help inmates acquire literacy, life, and job skills through post-secondary education, *see* 20 U.S.C. § 1151(f). But this assistance is available only to inmates under 35 years of age who are within seven years of release – a standard that juveniles serving life without parole will, of course, never meet. *Id.* As a result, only those juveniles who can pay for course fees themselves are able to pursue post-secondary education. These fees are often be-

yond the means of prisoners and their families. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 69.

Other rehabilitative services are similarly unavailable to juveniles sentenced to life without parole. Confronted with limited resources, prisons often give enrollment preference for education, vocational, and other services to inmates with shorter sentences. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 70-71 (Pennsylvania and California corrections department representatives explain that inmates sentenced to life without parole have lowest priority and may have difficulty accessing vocational programs). These policies can deny access to basic rehabilitative services – such as GED courses or Alcoholics Anonymous meetings – for inmates sentenced to life without parole as juveniles. *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 21; Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced To Life Without Parole In California* 56-57 (2008), *available at* http://www.hrw.org/reports/2008/us0108/us0108web.pdf.

In still other cases, prison security classifications prevent juveniles from accessing vocational and other rehabilitative services. In California, for example, inmates are assigned security levels based in part on the severity of their sentence; state regulations mandate that inmates sentenced to life without parole receive a high security level that restricts their movement throughout the prison and their access to work programs. *See id.* Unlike other in-

mates, they receive this high security classification regardless of their behavior – limiting the ability of juveniles to access rehabilitation services no matter how well they behave. *Id.*

3. The practical impact of denying rehabilitation is bleak: Juveniles suffer hopelessness and isolation at the time in their lives when education and other developmental opportunities are most critical. Of course, many juveniles sentenced to life without parole strive successfully to better themselves, notwithstanding the barriers to accessing rehabilitative services. *See, e.g., id.* at 48-49. In other cases, however, juveniles may react to the isolation and hopelessness of their sentence with disruptive behavior, *see* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 57 – a perverse consequence given their unique potential for reform, and one that could be avoided through precisely those rehabilitative services that juveniles with life sentences cannot access. *See* Office of Justice Programs, Dep't of Justice, *Juveniles in Adult Prisons and Jails: A National Assessment* 63, *available at* http://www.ncjrs.gov/pdffiles1/bja/182503-2.pdf (noting that youthful offenders can be "more difficult to deal with," but that "this population's significant developmental, emotional, and cognitive issues can be addressed by appropriate programming"). To make matters worse, young offenders may also fall prey to the violent behavior of other inmates: Juveniles incarcerated in adult prisons face a serious risk of sexual and physical assault. *See* Nellis and King, *No Exit*, *supra*, at 39.

In short, juvenile life without parole rejects rehabilitation in theory and in practice. Like the death penalty, therefore, the practical effect of a life-without-parole sentence is to extinguish any possibility for juvenile offenders to "attain a mature understanding of [their] own humanity." *See Roper*, 543 U.S. at 576; *see also Hampton*, 666 S.W.2d at 741 (life without parole, "like death, is a sentence different in quality and character" from sentences to a term of years").

II. LIFE WITHOUT PAROLE IS OFTEN IMPOSED ON JUVENILES WITHOUT ANY CONSIDERATION OF THEIR DIMINISHED CULPABILITY

For the reasons set forth above and accepted by this Court in *Roper*, sentencing juveniles to life without parole violates the Eighth Amendment – particularly where, as here, it is imposed for non-homicide offenses. This violation persists no matter what procedure is used to impose the sentence. But there is another compelling reason to prohibit juvenile life without parole that was not present in *Roper*: the sentence, unlike the death penalty, is often imposed on juveniles without any consideration by a judge or jury of their diminished culpability.

Before *Roper* held that the Eighth Amendment categorically prohibits sentencing juveniles to death, a judge or jury was required to consider juvenile offenders' diminished culpability on a case-by-case basis before imposing the death penalty. *See Roper*, 543 U.S. at 602-03 (O'Connor, J., dissenting). Indeed, it was in part because of the availability of this individualized consideration that some members of

this Court rejected the imposition of a categorical bar against the penalty. *See id.* (concerns about juvenile culpability can be addressed "through individualized sentencing in which juries are required to give appropriate mitigating weight to" a juvenile's diminished culpability); *id.* at 620 (Scalia, J., dissenting).

Because predicting a juvenile's future characteristics is so difficult, of course, *Roper* ultimately concluded that no individualized sentencing procedure could cure the juvenile death penalty's Eighth Amendment violation. *See* 543 U.S. at 572-73. And while this reasoning applies with equal force here, juvenile offenders who receive life-without-parole sentences are often deprived of even the individual consideration that this Court ultimately found inadequate in *Roper*. Indeed, unlike death penalty cases – where individualized consideration of a defendant's culpability is constitutionally required – individualized consideration is frequently impossible in cases involving juvenile life without parole.[3] Instead, juvenile offenders are frequently subject to mandatory transfer and mandatory sentencing statutes, whose use has exploded during the past two decades. The combined effect of these laws often dooms juvenile offenders. At the outset, they require many juveniles to be tried as adults. Then, upon conviction in the adult system, they mandate life-

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[3] Juveniles' uniquely diminished culpability sets juvenile life without parole apart from terms of years imposed on adult offenders such as the one this Court considered in *Harmelin v. Michigan*, 501 U.S. 957 (1991), where the concerns that this Court raised in *Roper* were not present.

without-parole sentences for certain crimes. Together, these laws deny juveniles any opportunity to have their age and diminished culpability considered by any decision-maker at any stage of the proceedings against them.

1. Juvenile life without parole sentences are precipitated by a transfer from juvenile court to the adult criminal system – an occurrence that has grown in use and become less discretionary over time. *See* Nellis and King, *No Exit*, *supra*, at 29. To transfer juveniles to the adult system, states employ a variety of mechanisms, the use and expansion of which grew dramatically during the 1990s in response to warnings – long since proven unfounded – about an impending crime wave caused by juvenile "superpredators." Between 1985 and 1994 alone, the number of juveniles transferred to adult court nationwide doubled; this doubling, in turn, fueled an increase in the number of juveniles sentenced to life without parole. *Id.*[4]

While waiver into the adult system has always been allowed, it has become far less discretionary in recent years. Since the early-Twentieth Century inception of the juvenile justice system, juvenile judges

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[4] The present cases illustrate how transfer to the adult system necessarily increases a juvenile's risk of receiving a life-without-parole sentence. Terrance Graham was charged as an adult under a statute that vests prosecutors with unreviewable discretion to file charges against juveniles directly in adult court, *see* Pet'r Br. 13, *Graham v. Florida*; Joe Sullivan was charged in adult court under the state's mandatory direct filing law, *see* Pet'r Br. 2, *Sullivan v. Florida*. In neither case would the petitioner have received a life-without-parole sentence had he been convicted in the juvenile system.

have largely retained the discretion to waive jurisdiction and allow prosecution of adolescents in adult court. *See* Massey, *Disposing of Children*, *supra*, at 1087. When exercising this discretion, a judge typically waives jurisdiction only after considering an individual juvenile's circumstances: for example, his home life, susceptibility to peer pressure, and degree of involvement in the crime. Newly-enacted direct filing and mandatory waiver statutes, however, eliminate judicial discretion altogether. Because of the expanded use of these statutes, the number of juveniles who received some sort of judicial transfer hearing prior to being sentenced to life without parole has declined markedly. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 19 (by 2000, only 13 percent of juveniles tried in adult court had received a prior transfer hearing before a juvenile court).

Direct filing, for example, permits prosecutors to file charges against a juvenile directly in adult court. The prosecutor unilaterally determines whether to prosecute a particular juvenile as an adult, with no judicial transfer hearing and typically on the sole basis that probable cause exists to believe the juvenile committed the crime in question. *See* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 714-15 (1998). Fourteen states and the District of Columbia have enacted direct filing laws, and the offenses which are subject to direct filing – and the ages to which the statutes apply – vary by state. *See* Richard E. Redding, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent To Delinquency?* 2

(2008), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.

In many states, direct filing laws cover a vast group of offenses – not just the most serious ones. In Arkansas, for example, prosecutors may file charges in adult court against 14- and 15-year olds for offenses including kidnapping and first-degree battery, and against juveniles who are 16 and older for any felony at all. *See* Ark. Code Ann. § 9-27-318(c). In Michigan, the state's direct filing law grants criminal courts jurisdiction over juveniles as young as 14 for offenses ranging from carjacking to escape from a juvenile facility, as well as a variety of drug crimes. Mich. Comp. Laws § 600.606. And in Florida, the direct filing statute permits prosecutors to charge 14- and 15-year olds in adult court for offenses including grand theft of a motor vehicle and committing a lewd action in front of a minor; when the juvenile is 16 or older, it permits direct filing for any crime – including, in some circumstances, misdemeanors. Fla. Stat. § 985.557; *see also* Patrick Griffin et al., Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles As Adults in Criminal Court: An Analysis Of State Transfer Provisions* 8 (1998), *available at* http://www.ncjrs.gov/pdffiles/172836.pdf. In none of these cases does a judge consider the culpability of the individual juvenile offender before he is charged in adult court.

Mandatory waiver laws permit no more discretion for judges than do direct filing statutes. In force in 29 states, *see* Redding, *Juvenile Transfer Laws*, *supra*, at 2, mandatory waiver laws require juvenile judges to relinquish jurisdiction if a juvenile meets

certain criteria: for example, if he is charged with a particular crime. While cases subject to mandatory waiver originate in juvenile court, the juvenile judge has no discretion to consider an offender's age or culpability; his only role is to confirm that the statutory criteria are met and, if so, to send the juvenile to adult court. *See* Griffin, *Trying Juveniles As Adults in Criminal Court*, *supra*, at 4. The statutes can make consideration of a juvenile's culpability difficult in more subtle ways, too. Connecticut's mandatory waiver statute, for example, requires juveniles as young as 14 to be transferred to adult court when charged with certain felonies. The law prohibits the juvenile's attorney from filing any motion, or otherwise making any argument, to oppose the mandatory waiver. *See* Conn. Gen. Stat. § 46b-127(a). And while the statute requires a juvenile judge to find probable cause before mandatory waiver applies to certain felonies, the probable cause hearing occurs without notice, a hearing, or any participation by the juvenile or his attorney. *See id.*; *see also* Griffin, *supra*, at 6.

2. Compounding the effect of mandatory transfer laws are mandatory sentencing statutes, which require judges to impose life without parole in certain circumstances. By design, these statutes wholly remove sentencing discretion from judges, preventing them from considering a juvenile's culpability or potential for reform. Not surprisingly, juveniles receive life without parole with a greater frequency in states with mandatory sentencing laws: The eight states with the highest rates of sentencing juveniles to life without parole all make the sentence mandatory upon conviction for certain crimes. *See* Human

Rights Watch, *The Rest of Their Lives*, *supra*, at 37-38. The five states with the lowest rate of imposing the sentence, by contrast (other than those that do not impose it at all), make it discretionary. *See id.* In these states – where sentencing judges retain the ability to weigh juveniles' culpability and potential for reform on a case-by-case basis – the lower rate of imposing life without parole strongly suggests that judges do not view the sentence as a proportionate one for young offenders.[5]

3. Together, mandatory transfer and mandatory sentencing laws present a perfect storm for juveniles: At the outset, they require that the juvenile, if charged with a certain crime, be tried in adult court. Then, upon conviction in the adult system, they require the judge to sentence the juvenile to life without parole. At no stage of the proceedings is a judge permitted to consider the juvenile's degree of involvement in the crime, mental health status, or history of trauma – factors that would, if considered, counsel heavily in favor of a lesser sentence. *See* Nellis and King, *No Exit*, *supra*, at 19.

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[5] Indeed, some judges have stated in open court that they would not sentence juvenile offenders to life without parole if they retained discretion to impose a lesser sentence. For example, after a juvenile defendant was convicted of first-degree murder by a Cook County jury, Judge Thomas Dwyer informed him that "I sentence you to a term of natural life in the Illinois Department of Corrections . . . That is the sentence that I am mandated by law to impose. If I had my discretion, I would impose another sentence, but that is mandated by law." *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 10.

In practice, the result is unforgiving. In Colorado, for example, prosecutors in 1992 charged 15-year old Jacob Ind as an adult after he murdered his parents, who had subjected him to years of physical and sexual abuse. *See* Gail B. Goodman, Comment, *Arrested Development: An Alternative to Juveniles Serving Live Without Parole in Colorado*, 78 U. Colo. L. Rev. 1059, 1059-60 (2007). Under Colorado's mandatory sentencing statute, the judge was required to sentence Ind to life without parole without regard for his abuse – a fact with which she expressed frustration. *Id.* at 1060; *see also* Sue Lindsay, *Growing Up in Prison*, Rocky Mountain News, Sept. 19, 2005, at 6A (Judge Mary Jane Looney remarked that "[i]t seems to me that kind of change [allowing parole] might be an appropriate change in the statute in many cases that I've seen – certainly this case"). While Colorado has since abolished juvenile life without parole, the change was not retroactive; as a result, Ind is still serving the sentence. *See* Nellis and King, *No Exit*, *supra*, at 23.

In Illinois, a punitive aiding and abetting statute has compounded the effect of the state's mandatory transfer and sentencing laws. Under this "accountability statute," an accomplice – no matter how small his role in a crime – must receive the same punishment as the principal. *See* 720 Ill. Comp. Stat. § 5/5-2. The statute acts in tandem with the state's mandatory waiver law, which enables the automatic transfer to adult court of certain juveniles, as young as 15, who are charged on an accountability theory. *See* 705 Ill. Comp. Stat. § 405/5-130. Both statutes are backed up by a mandatory sentencing law, which requires the imposition of life without parole in a va-

riety of cases. 730 Ill. Comp. Stat. § 5/5-8-1. The result: More than 95 percent of juvenile life without parole cases in Illinois were transferred automatically to adult court, and nearly 80 percent of them received a mandatory life-without-parole sentence. *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 11-12. In none of these cases did a judge or jury consider the juvenile offender's age, culpability, or potential for reform.

And in Washington, at least 28 adolescents are serving life sentences without the possibility of parole. In each of these cases, life without parole was the only sentence available to the court; for 13 of the juveniles, the state's mandatory waiver law prevented a judge from ever considering their age or diminished culpability at a transfer hearing. *See* Washington Coalition For The Just Treatment Of Youth, *A Reexamination Of Youth Involvement In The Adult Criminal Justice System In Washington* 13 (2009), *available at* http://www.columbialegal.org/~lumbia/files/JLWOP_cls.pdf.

Despite this Court's admonition that they are less culpable than adults, therefore, juveniles are frequently sentenced to life without parole – the most severe penalty to which they may be subjected – without any consideration of whether the sentence is proportionate in light of their diminished culpability. For this reason, too, juvenile life without parole is a grossly disproportionate sentence that violates the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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Dated: July 23, 2009

AMICUS CURIAE BRIEF

Nos. 08-7412; 08-7621

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THE FIRST DISTRICT

BRIEF OF SIXTEEN MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iv

Interest of the *Amici* 1

Summary of Argument 2

Argument 4

I. Article 37 of the UN Convention on the Rights of the Child Is Not Binding on the United States Under the Theory of *Jus Cogens* 4

A. The International *Amici* Inadequately Explain The Developing Theory of *Jus Cogens* 6

B. There is No International Consensus Regarding Juvenile Sentencing 14

1. A number of nations reject the theory that they are prohibited as a matter of law from imposing the sentence of life in prison without parole 19

2. The findings of the UN Committee on the Rights of the Child demonstrate widespread "violations" of Article 37 25

3. Other significant violations of Article 37 are revealed by the UN Committee Reports 30

C. Summary Re *Jus Cogens* and Customary International Law 38

II. The United States is not in Violation of Any Binding Treaty Obligation by Sentencing Juveniles to Life in Prison 40

III. The Coerced Use of International Law Violates The Principle of Self-Determination 43

CONCLUSION 45

TABLE OF AUTHORITIES

Page(s)

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253 F.3d 918 (7th Cir. 2001) 42

Matar v. Dichter,
563 F.3d 9 (2d Cir. 2009) 11

Medellín v. Texas,
552 U.S.__, 128 S. Ct. 1346 (2008) 42

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45 I.L.M. 562,
2006 WL 1667673 (ICJ 2006) 9, 10

Director of Public Prosecutions, KwaZulu-Natal v. P 2006 (3) SA 515 (SCA); [2006]
1 All SA 446 (SCA);
2006 (1) SACR 243 (SCA) 32

M v. The State, CCT 53/06 [2007]
ZAAC 18 (Const. Ct. of S.A.) 33

U.S. DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL PROVISIONS

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(U.S. 1776) 43, 44

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U.S. CONST. amend. X.....44

NON-U.S. STATUTES

Powers of Criminal Courts
(Sentencing) Act (U.K., 2000) 34

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O.A.S. Res. XXX, Art. VII (1948).....42

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Interest of the *Amici*

The following members of the United States House of Representatives submit this brief as *amici curiae*: Rep. Thaddeus McCotter (AR), Rep. Doug Lamborn (CO), Rep. Pete Hoekstra (MI), Rep. John Fleming (LA), Rep. Trent Franks (AZ), Rep. Todd Akin (MO), Rep. Robert Latta (OH), Rep. Jim Jordan (OH), Rep. Todd Tiahrt (KS), Rep. Phil Gingery (GA), Rep. Cynthia Lummis (WY), Rep. Dan Burton (IN), Rep. Gus Bilirakis (FL), Rep. Mark Souder (IN), Rep. John Boozman (AR), and Rep. Rob Bishop (UT).[1]

Representatives McCotter and Lamborn are co-chairs of the House Sovereignty Caucus. Many, but not all, of the *amici* are members of this caucus.

These members believe that sovereignty is the ability of a people to determine their own political and national destiny. Just as political power has been driven over the years from state to federal government, today influence is being stripped from our federal government and being granted to international institutions—diminishing the ability of "We the People" to govern our own affairs.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution intended to fund its preparation or submission. Both the respondent and the petitioners have filed a blanket waiver in both cases.

These members intend to stand to protect and defend the rights of American citizens and the interests of American institutions from the increasing influence of international organizations and multilateral agreements. They also intend to promote policies and practices which protect U.S. self-determination, national security, free trade with free nations, and the advancement of constitutional principles. They are committed to defend American values from encroachment by international actors and provide a voice of opposition to transnational doctrine.

Summary of Argument

Amnesty International and a number of other international *amici* have submitted a brief (hereinafter International *Amici*) which argues that the State of Florida is prohibited by certain international legal obligations from imposing a sentence of life in prison without parole (LWOP) on a juvenile. This brief is submitted in direct response to the International *Amici* and the limited arguments concerning international law made in the briefs of the petitioners and a small number of other *amici*.

The assertion that the United States is the only nation on earth that permits the sentencing of juveniles to life in prison without parole is false. Moreover, the International *Amici* have not given this Court a comprehensive or accurate description of the juvenile sentencing laws in other nations.

The *amici's* theory that the United States is bound to obey the provisions under Article 37 of the United Nations Convention on the Rights of the Child under the principle of *jus cogens* is without factual or legal foundation for at least three reasons:

- The *jus cogens* doctrine has no agreed elements or standards.

- *Jus cogens* has no application outside the invalidation of an offending treaty.

- The prohibition against juvenile life imprisonment does not satisfy the criteria for customary international law because there is no evidence that Article 37 reflects the general international practice of juvenile sentencing or that the other nations of the world feel legally compelled to obey its dictates.

The United States has taken reservations to the other treaties cited by the International *Amici* that render them inapposite to this case.

Finally, we respectfully suggest that the use of international law to attempt to govern the people of the United States violates both the letter and spirit of our Constitution as well as the recognized international human rights principle of self-determination.

Argument

I. Article 37 of the UN Convention on the Rights of the Child Is Not Binding on the United States Under the Theory of *Jus Cogens*

The lead argument of the International *Amici* is that "the prohibition of juvenile life without parole is *jus cogens*" and is thus binding on the United States.[2] This assertion is predicated on an express prohibition contained in Article 37(a) of the United Nations Convention on the Rights of the Child (CRC).[3] All nations are parties to the CRC except for the United States and Somalia.[4]

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[2] Int'l *Amici* at 10.

[3] Article 37 contains two sections concerning sentencing of juvenile offenders.

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

[4] Int'l *Amici* at 16, fn. 6.

The United States signed the CRC on February 16, 1995.[5] However, in the intervening 14 years, no President of the United States has submitted the CRC to the Senate for its advice and consent. Until the Senate ratifies the treaty, the United States is not a party and, by definition, is not bound by its provisions even in an international tribunal much less in the domestic courts of the United States. *See*, Vienna Convention on the Law of Treaties (VCLT),[6] Articles 24 (3) and 26. Article 26, which contains the most fundamental principle of international treaty law, *pacta sunt servanda* (agreements must be kept), is especially important. It provides that treaties are binding upon "parties." The duty to obey treaties in good faith is a duty undertaken only by a party.

Even if the United States becomes a party to the CRC by ratification, it is not clear that any obligation contained in that treaty would be self-executing. The United States often takes reservations, declarations or understandings to human rights treaties ensuring that some or all provisions are to be construed as non-self-executing.[7]

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[5] United Nations Treaty Collection, Chap. IV, Human Rights No. 11.

[6] 1155 U.N.T.S. 331 (May 23, 1969)

[7] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014, 660 U.N.T.S. 195 (1966) (Ratified: October 21, 1994), Declaration 1: "That the United States declares that the provisions of the Convention are not self-executing." The United States declared Articles 1-27 of the International

The International *Amici* ignore these fundamental principles of international law. They contend that the United States is nonetheless bound to obey the provisions of Article 37 on the notion that it contains rules which are "*jus cogens.*" We will show that the sentencing standards in Article 37 cannot possibly be considered *jus cogens* for both factual and legal reasons.

A. The International *Amici* Inadequately Explain The Developing Theory of *Jus Cogens*

The International *Amici* point to Article 53 of the VCLT for recognition of the principle called "*jus cogens.*" This article does nothing more than proclaim the invalidity of treaties which contain provisions that violate "peremptory norms."[8] The

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Covenant on Civil and Political Rights (G.A. Res. 2200A, Art. 24(1), U.N. GAOR, 16th Sess., Supp. No. 16, U.N. Doc. A/6316,999 U.N.T.S. 171 (1966)) and Articles 1-16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, 1465 U.N.T.S. 85 (1984)) to be non-self-executing.

[8] Article 53 reads:

Treaties conflicting with a peremptory norm of general international law ("jus cogens")

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community

widely-used treatise by Professor Ian Brownlie,[9] cited by the International *Amici*,[10] notes that *jus cogens* is a theory of "rules, or rights or duties, on the international plane."[11] *Jus cogens* principles "are rules of customary law which cannot be set aside by treaty or acquiescence. . . ."[12] The purpose of the doctrine of *jus cogens* is to create a rule invalidating offending treaties.

A treatise devoted to the subject of *jus cogens* suggests that the Hitler-Stalin Pact is a good example of a treaty that violates *jus cogens* although it notes that it is also "a good example of confusion and difficulties" associated with this theory.[13]

> of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[9] Ian Brownlie, *Principles of International Law* (Oxford University Press, Oxford (2008 (7th ed.)). (Hereinafter "Brownlie").

[10] Int'l *Amici* at 11.

[11] Brownlie at 510.

[12] *Id.*

[13] Wladyslaw Czaplinksi, "*Jus Cogens* and the Law of Treaties" in *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes, Christian Tomuschat and Jean-Marc Thousvenin (Eds.) Martinus Nijhoff Publishers Leiden, The Netherlands (2006), p. 84. (Hereinafter, *Jus Cogens* Treatise).

Although there is widespread agreement that the theory of *jus cogens* exists, there is little consensus as to which rules fall within the doctrine. No consensus exists as to the elements for judging a claim that some particular action violates *jus cogens*.

The International Law Commission (ILC), which drafted the VCLT, "was convinced that no catalogue of peremptory norms could be formulated."[14] Its 1966 official commentary demonstrates some of the difficulties inherent in the theory of *jus cogens*:

> The formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*.
>
> ...[T]he majority of the general rules of international law do not have that character....
>
> It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.[15]

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[14] *Id.* at 87.

[15] Yearbook of the International Law Commission, 1966, Vol. 2, pp. 247-248

The *Jus Cogens* Treatise, *supra*, notes:

> The concept of *jus cogens*, which was discussed at length for a long time during the sixties and the seventies in connection with the work of the International Law Commission on the law of treaties, has now been accepted almost unanimously. By contrast, this consensus disappears concerning the content of *jus cogens* and even its definitions.[16]

Even the brief of the International *Amici* acknowledges that "commentators may disagree on the exact scope of all *jus cogens* norms."[17] However, these *amici* give this Court no objective basis for determining which claims qualify as *jus cogens*. Again, Brownlie says that "the proponent of a rule of *jus cogens* in relation to this article will have a considerable burden of proof."[18]

The International *Amici* are asking this Court to blaze a trail on a theory that even the International Court of Justice has barely touched. In 2006, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v.*

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[16] Paul Tavernier, "L'identification des règles fondamentales, un problem résolu?", in *Jus Cogens Treatise*, p. 19.

[17] Int'l *Amici* at 13.

[18] Brownlie at 512.

Rwanda),[19] the ICJ acknowledged *jus cogens* but nonetheless refused to override a nation's lack of refusal to consent to the court's jurisdiction. Judge *Ad Hoc* Dugard's concurring opinion focused on *jus cogens*:

> This is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*. It is strange that the Court has taken so long to reach this point because it has shown no hesitation in recognizing the notion of obligation *erga omnes*, which together with *jus cogens* affirms the normative hierarchy of international law.[20]

Armed Activities involved acts of "killing, massacring, raping, throat-cutting, and crucifying...against more than 3,500,000 Congolese."[21] The Court was certain that these actions were violations of the norms of *jus cogens*.[22] Nonetheless, the ICJ dismissed the claims filed by the Republic of the Congo because Rwanda had not consented to the Court's jurisdiction.[23]

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[19] 45 I.L.M. 562, 2006 WL 1667673 (ICJ 2006).

[20] *Id.* at 610, Dugard, concurring, para. 4.

[21] *Id.* at 568, para. 11(d).

[22] *Id.* at 579, para 64.

[23] *Id.* at 579, para. 64-70.

Judge Dugard explained this limitation on the doctrine of *jus cogens*:

> The approval given to *jus cogens* by the Court in the present Judgment is to be welcomed. However, the Judgment stresses that the scope of *jus cogens* is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law.[24]

The rule of the ICJ is closely parallel to an accepted rule in the courts of the United States. *See, e.g., Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) ("A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity.")

Article 53 of the VCLT describes *jus cogens* principles as those which permit no derogation. But even "non-derogable" principles have their limits, as Dugard noted.

This decision of the ICJ makes it plain that *jus cogens* principles are not always legally enforceable. The requirement of consent by a nation to the jurisdiction of the ICJ was held to be a higher value than the *jus cogens* principle against genocide. Rwanda did not consent to ICJ jurisdiction. The United States has not consented to the CRC. The necessity of our consent should not be overridden by this theory.

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[24] *Id.* at 610, Dugard, para. 6.

The confusion of the International *Amici* may arise from a misunderstanding of the term "no derogation." Brownlie's treatise reveals the meaning of this key concept, which is found in the commentary of the International Law Commission on the VCLT:

> The Commission commentary makes it clear that by 'derogation' is meant the use of agreement (and presumably acquiescence as a form of agreement) to contract out of rules of general international law. Thus an agreement by a state to allow another state to stop and search its ships on the high seas is valid, but an agreement with a neigbouring state to carry out a joint operation against a racial group straddling the frontier which would constitute genocide if carried out, is void since the prohibition with which the treaty conflicts is a rule of *jus cogens*.[25]

Black's Law Dictionary reveals the key meaning of the term "derogation:"

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[25] Brownlie at 511-512. The ILC's official commentary provides: "the Commission concluded that in codifying the law of treaties it must start from the basis that to-day there are certain rules from which **States are not competent to derogate at all by a treaty arrangement**, and which may be changed only by another rule of the same character." *Yearbook of the International Law Commission, 1966*, Vol. II, p. 247. (Emphasis added).

> The partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force (statutes in derogation of the common law).[26]

It is clear that the impact of this theory is limited to the law of treaties. "*Jus cogens* denominates rules whose effect is to make conflicting treaties void...."[27]

The United States has not entered into any treaty with another nation that obligates American courts to impose LWOP on juvenile felons. If there were such a treaty, then perhaps some court might invalidate the hypothetical "Mandatory LWOP Treaty" under the *jus cogens* theory. The laws of Florida are not treaties and thus may not be invalidated under this theory.

Even though there are no agreed standards for determining which principles are properly classified as *jus cogens*, the International *Amici* ask this Court to undertake what amounts to judicial lawmaking in a field riddled with vagueness. One scholar proclaims:

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[26] *Black's Law Dictionary* (8th ed. 2004) (first definition). In the 1968 edition—a date that is contemporaneous with the drafting of the VCLT—this is the sole definition. *Black's Law Dictionary* (Rev. 4th ed. 1968).

[27] Stefan Kadelbach, "*Jus Cogens*, Obligations *Erga Omnes* and other Rules—The Identification of Fundamental Norms," in *Jus Cogens* Treatise, p. 26.

> Ultimately, the uncertainties surrounding the identification of the basic rules do not hamper their development in contemporary international law, and the vagueness resulting from this indeterminacy may even favour, in this field like in others, progress of the law.[28]

This Court should not embrace the role of a progressive change agent in the field of contemporary international law. In this nation, the political branches have the sole authority, subject to constitutional limitations, to enact new fundamental legal norms.

B. There is No International Consensus Regarding Juvenile Sentencing

As we have seen, "the criteria which help to identify *jus cogens* norms are not entirely clear."[29] The International *Amici* suggest three criteria, albeit without the benefit of any citation of authority.

> A *jus cogens* norm must fulfill three basic requirements:
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> 1) it is general or customary international law;

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[28] Tavernier, *supra*, at 20.

[29] Kadelbach, *supra*, at 28.

> 2) it is accepted by a large majority of states as non-derogable; and
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> 3) it has not been modified by a new norm of the same status.[30]

Assuming *arguendo* that these criteria have some validity, it is apparent that the content of Article 37 of the Convention on the Rights of the Child simply cannot meet the first of these standards.[31]

The theory of customary international law is advanced in an attempt to convince this Court that the juvenile sentencing standards in Article 37 are binding on the United States. This theory is premised on a bold assertion that the United States is the only nation in the world that is out of compliance with this alleged standard of customary international law. A careful consideration of facts and law concerning the sentencing of juvenile offenders in other nations robs this argument of its alleged status as a principle of CIL. Moreover, the same evidence eliminates any reasonable possibility that this Court could legitimately view this factual assertion as a persuasive authority guiding its domestic interpretation of the Eighth Amendment. It is simply not true that America is the only nation

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[30] Int'l *Amici* at 13.

[31] We have already discussed the "no derogation" principle above. The third criterion is inapplicable. No one claims that a relevant *jus cogens* principle used to exist but that it has been supplanted.

in "violation" of the sentencing principles contained in Article 37.

The theory of customary international law has come to be grounded, at least in international tribunals, on Article 38(1) of the Statutes of the International Court of Justice. This Article codifies the sources of international law. Subsection (b) lists the relevant elements: "international custom, as evidence of a general practice accepted as law."

Brownlie explains that "what is sought for is a general recognition among States of a certain practice as obligatory. Although occasionally the terms are used interchangeably, 'custom' and 'usage' are terms of art and have different meanings. A usage is a practice which does not reflect a legal obligation."[32]

The relevant factors in ascertaining a rule of customary international law include duration, uniformity or consistency of the practice, generality of the practice, and *opinio juris et necessitatis*.[33]

The *opinio juris* element is most relevant to the matter at hand. This element is reflected in the requirement of Article 38 of the ICJ Statutes as "a general practice *accepted as law*."[34] This element

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[32] Brownlie at 6. Internal quotation marks and citations omitted.

[33] Brownlie at 7-8.

[34] Brownlie at 8. (Emphasis in the original).

reflects "recognition by states of a certain practice as obligatory."[35] The "practice of States recognizes a distinction between obligation and usage."[36]

If Article 37 of the Convention on the Rights of the Child is to be considered a rule of customary international law then two things must be demonstrated to pass the *opinio juris* element:

(a) it must be shown that the rules contained in that article are widely obeyed by the nations of the world with few exceptions, and

(b) that the acts of obedience must be on the basis that the States believe they are legally obligated to do so.

The International *Amici* and both petitioners contend that "[o]nly the United States still imposes" LWOP.[37] Even if true, taken literally this statement is insufficient to establish a rule of customary international law. What must be proven is that all (or nearly all) of the other nations in the world follow this practice and that they follow this practice because they believe they are legally obligated to do so. The International *Amici* and others point to the fact that all the nations on earth, save the United States and Somalia, have ratified the UN Convention on the Rights of the Child. This treaty is

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[35] *Id.*

[36] *Id.*

[37] Int'l *Amici* brief at 9.

the sole basis for the claim that other nations feel legally compelled to obey the sentencing standards of Article 37.

The CRC contains a comprehensive set of standards that purport to govern all facets of a child's life. There is a right to leisure contained in Article 31. If the mere adoption of a treaty by 193 nations is a sufficient ground to create a rule of *jus cogens* or customary international law, then the right to leisure clearly qualifies.

However, we will limit our review of the practice of States regarding the juvenile justice rules contained in Article 37—with particular emphasis on the standards for sentencing juvenile offenders. It will be clear that a number of nations reject the notion that they are legally obligated to obey the provisions of Article 37 including the prohibition of the sentence of life in prison without parole for juveniles. Moreover, it will be apparent that the actual practice of nations reveals that there is widespread non-compliance with the juvenile justice sentencing standards contained in the CRC. Thus, the CRC's sentencing standards cannot be considered a rule of customary international law because there is neither a general practice of obedience nor a widespread belief that nations are legally obligated to implement Article 37.

1. A number of nations reject the theory that they are prohibited as a matter of law from imposing the sentence of life in prison without parole

The brief of the International *Amici* reveals an inconsistency in the theory that America is alone in allowing for LWOP sentences. The International *Amici* identify ten nations that "have laws that could permit the sentencing of child offenders to life without parole" but "there are no *known* cases where the sentence has been imposed."[38] These ten are: Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka. Even if it is true that there are no known cases in these states—and the methodology for gathering this evidence is highly suspect[39]—any actual practice by these ten nations does not satisfy the second part of the *opinio juris* standard. They must refrain from imposing LWOP out of a belief of a mandatory legal obligation. If the laws of a nation permit LWOP, any refusal to employ that sentence arises from policy or other reasons, not a legal mandate.

The source for the allegation that "only the United States still imposes this penalty," as well as the list of ten nations, is Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in*

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[38] Int'l *Amici* at 17. (Emphasis supplied.)

[39] *See, e.g.*, the use of emails "on file with counsel" to demonstrate sentencing practices. Int'l *Amici* at 36.

Prison, 42 U.S.F.L. Rev. 983, 989-1007 (2008). This article claims that "135 counties have expressly rejected the sentence via their domestic legal commitments." *Id.* at 989. It is important to check the source of this claim. The authors of the law review article cite a report entitled *The Rest of Their Lives*, written by Amnesty International and Human Rights Watch. Amnesty International is the lead amicus in the group of International *Amici*. *The Rest of their Lives* contains the following assertion: "At least 132 countries reject life without parole for child offenders **in domestic law *or practice.***"[40]

There is no explanation of how the number 132 in the Amnesty report grew to 135 in the law review article. The more pertinent change is the change from "domestic law or practice" in the Amnesty International publication to "domestic legal commitments" in the law review article. There is a critical difference between *law* and *practice* in this context. This Court has not been given anything that remotely resembles a reliable count of nations with domestic legislation that actually prohibits the imposition of the sentence of LWOP. Without domestic legislation, the legal compulsion prong of the *opinio juris* standard is missing.

The International *Amici* claim to supply the missing proof of the legal-obligation criterion by reference to the fact that 193 nations have become parties to the CRC. The general rule of

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[40] Amnesty International and Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) p. 5. Emphasis supplied.

international law on the domestic effect of treaty obligations does not support this proposition:

> It should not be assumed that once a treaty has entered into force for a state it is then in force *in* that state; in other words, that it has become part of its law. The point is of particular importance for treaties which accord rights to individuals, such as human rights treaties, where the rights are intended to be exercised by them (and sometimes corporations). International law and domestic law (the law in force within a state; sometimes termed 'municipal', 'internal' or 'national' law) operate on different planes. International law is concerned with the rights and obligations of states and other international legal persons, such as international organisations. When a treaty provides for rights or obligations to be conferred on persons (legal or natural), they can usually be given effect *only* if they are made part of the domestic law of each party, and with provisions for their enforcement.[41]

In the United Kingdom "no provisions of a treaty can have effect in domestic law without legislation." *Id.* at 189. Moreover, "treaties are not supreme law in the United Kingdom, even if they have been incorporated. Parliament, being the

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[41] Anthony Aust, *Modern Treaty Law and Practice* (Second Ed.) Cambridge University Press (2007), p. 178.

supreme body in the British Constitution, can enact legislation which is inconsistent with treaty obligations." *Id.* at 192.

This Court has been given virtually no information on the domestic sentencing statutes of other nations and international law will not supply the missing link. Most nations are under no legal compulsion to give domestic effect to international treaties.

Not only have the International *Amici* failed to inform this Court of the domestic impact of the CRC in the party states, they have also failed to inform this Court of the significant number of nations that have taken reservations to the CRC which impact the nature of their undertaking even in international law.

Reservations to the CRC

The following nations have taken a general reservation to the entire Convention on the Rights of the Child, which naturally implicates their duty to obey (even as a matter of international law) the provisions of Article 37.

The following States have taken a reservation to the CRC to the effect that if the CRC conflicts with Sharia Law then Sharia law will prevail: Afghanistan, Iran, Iraq, Jordan, Kuwait, Maldives, Mauritania, Syrian Arab Republic, and United Arab Emirates.[42]

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[42] United Nations Treaty Collection, Chapter IV, No. 11, 1577 U.N.T.S. 3. All reservations may be found at

In a similar vein, Djibouti says that it "shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values."[43]

Additionally, there are a number of reservations concerning Article 37 itself. Australia, Canada, Iceland, Japan, New Zealand, Switzerland, and the United Kingdom have taken reservations to Article 37(c) which provides:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances....

Most of these Article 37(c) reservations deal with the duty to segregate juvenile offenders from adult offenders.[44]

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http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

[43] *Id.*

[44] *Id.*

Singapore's reservation reads:

> The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit –
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> (a) the application of any prevailing measures prescribed by law for maintaining law and order in the Republic of Singapore;
>
> (b) measures and restrictions which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedoms of others; or
>
> (c) the judicious application of corporal punishment in the best interest of the child.[45]

The relevant reservation for the Netherlands reads:

> The Kingdom of the Netherlands accepts the provisions of article 37 (c) of the Convention with the reservation that these provisions shall not prevent the application of adult penal law to children of sixteen years and older,

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[45] *Id.*

provided that certain criteria laid down by law have been met.[46]

This is especially significant because, as we demonstrate *infra*, in the Netherlands "application of adult penal law" includes the possibility of the imposition of the sentence of life without parole. Thus, insofar as the reservation is concerned, the Netherlands has entered into the CRC with the understanding that it may sentence 16 and 17 year-olds to life in prison without parole if it chooses to do so as a matter of domestic policy.

2. The findings of the UN Committee on the Rights of the Child demonstrate widespread "violations" of Article 37

To sustain the argument that Article 37 has become a rule of customary international law it is also necessary for the International *Amici* to demonstrate that the actual practice of states reflects overwhelming obedience to its dictates.

Article 44 of the CRC requires every state party to submit compliance reports within two years of the entry into force of the treaty for that state and every five years thereafter. After the submission of the reports from the states, the Committee on the Rights of the Child issues "Concluding Observations" which detail the findings relative to that state's compliance with the duties under the CRC.

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[46] *Id.*

It is important to review the findings of the Committee with respect to compliance with the dictates of Article 37. We segregate the findings into two categories: (a) violations regarding the use of the death penalty and life in prison without parole, and (b) other violations of Article 37 concerning the administration of juvenile justice. As will be apparent, insofar as the Committee is concerned, a nation violates the CRC if it either employs LWOP or allows for its use in its domestic law.

Findings by the Committee on the Rights of the Child

Juvenile Death Penalty and LWOP

Niger

Concerning Niger, in June of 2009, the CRC Committee "urged" this state to:

> Take immediate steps to halt and abolish by law imposition of death penalty and life sentence for crimes committed by persons under 18.[47]

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[47] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Niger, CRC/C/NER/CO/2, 18 June 2009, para. 81. (All such reports hereafter called "CRC Report".) For the ease of the Court's research, we strongly recommend http://tb.ohchr.org/default.aspx as the best source for UN reports.

The Netherlands

On March 27, 2009, the CRC Committee said:

> The Committee reiterates its concern that there is an increasing use of pre-trial detention for juveniles in the Netherlands, that there is still a possibility of 16 and 17 year-olds being tried under adult criminal law, and that 16 and 17 year olds can be convicted to life imprisonment in the Netherlands Antilles.[48]

Additionally, the Committee said: "The Committee recommends that the State party: Eliminate life imprisonment sentence of children."[49]

As previously noted, the Netherlands continues to maintain its reservation to the CRC which permits it to try and sentence 16 and 17 year-olds as adults, including the possibility of LWOP.[50]

Belize

The Committee's 2005 report for Belize makes the following pertinent comments:

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[48] CRC Report: The Netherlands, CRC/C/NLD/CO/3, 27 March 2009, para. 77.

[49] *Id.* at para. 78

[50] CRC Report: Netherlands, CRC/C/NLD/3, 23 July 2008, Aruba page 106 (Para. 96) or Netherlands page 19 (para. 95)

> As regards life imprisonment of children without provision for parole, [the State should] bring its domestic laws into full conformity with the provisions and principles of the Convention.
>
> The Committee is deeply concerned about the fact that children as young as 9 years of age can be sentenced to life imprisonment without provision for parole.[51]

The following additional nations have been urged by the Committee[52] to conform their juvenile sentencing laws because they permit the use of the death penalty, LWOP, or life in prison for juvenile offenders:

- Bangladesh (reports of implementation of death penalty for those under 18 and LWOP for those under 15)[53]
- Burkina Faso (death penalty and LWOP)[54]

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[51] CRC Report: Belize, CRC/C/15/Add.252, 31 March 2005,para. 70-71.

[52] We have used the most recent year for each nation listed. If the report is over five years old it is an indication that the nation is out of compliance with its reporting obligation. See, fn. 53 re Guatemala which uses its two most recent reports.

[53] CRC Report: Bangladesh, CRC/C/BGD/CO/4, 26 June 2009, para. 92.

- China (life imprisonment) [55]
- Dominica (LWOP)[56]
- Gambia (death penalty and LWOP)[57]
- Guatemala (death penalty and LWOP)[58]
- Jamaica (life imprisonment)[59]
- Japan (life imprisonment)[60]

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[54] CRC Report:Burkina Faso, CRC/C/15/Add.193,9 October 2002, para. 60.

[55] CRC Report: China CRC/C/CHN/CO/2, 24 November 2005, para. 89

[56] CRC Report: Dominica, CRC/C/15/Add.238, 30 June 2004, para 46: "The Committee is concerned at the lack of juvenile courts and at the fact that children may be sentenced to a penalty at the "President's pleasure", to life imprisonment and to whipping in private."

[57] CRC Report: Gambia, CRC/C/15/Add.165, 6 November 2001, para. 68.

[58] CRC Report: Guatemala, CRC/C/15/Add.58, 7 June 1996, para. 47. Guatemala's most recent report in 2001 reads: "The Committee expresses its serious concern that its previous recommendation encouraging the reform of the juvenile justice system to ensure full compatibility with the principles and provisions of the Convention has not been implemented...." CRC/C/15/Add.154, 9 July 2001, para. 56.

[59] CRC Report: Jamaica, CRC/C/15/Add.210, 4 July 2003, 57(b).

[60] CRC Report: Japan, CRC/C/15/Add.231, 26 February 2004, para. 53.

- Liberia (death penalty and LWOP)[61]
- Saint Lucia (LWOP)[62]
- Saudi Arabia (possibility of death penalty)[63]
- Trinidad and Tobago (life imprisonment)[64]

3. Other significant violations of Article 37 are revealed by the UN Committee Reports

The report on Kenya in 2007 objects to the treatment of juveniles in detention. "[D]espite a clear prohibition in the legislation, reports of torture, cruel, inhuman and degrading treatment indicate that it still occurs."[65] Other concerns include "shooting at children," "rapes of girls by law enforcement agents" that were not investigated, and only "limited progress in achieving a functioning juvenile justice system outside the capital." Significantly, "although the death penalty is

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[61] CRC Report: Liberia, CRC/C/15/Add.236, 1 July 2004, para. 68.

[62] CRC Report: Saint Lucia, CRC/C/15/Add.258, 21 September 2005, para. 72.

[63] CRC Report: Saudi Arabia, CRC/C/SAU/CO/2 17, March 2006, para. 32.

[64] CRC Report: Trinidad and Tobago, CRC/C/TTO/CO/2, 17 March 2006, para. 73.

[65] CRC Report: Kenya, CRC/C/KEN/CO/2, 19 June 2007, para. 32.

outlawed for children, according to some reports children are still being sentenced to death." [66]

Concerning Uruguay in 2007:

> The Committee is concerned over the high number of children deprived of liberty and over reports indicating cases of torture and degrading treatment by law enforcement officials of children while held in detention.[67]

Uruguay was also admonished to create a juvenile justice system.[68]

The report on Bulgaria in 2008 expressed concern over the numerous reports of children being ill-treated or tortured while in detention. Again, this nation was admonished to create an adequate system of juvenile justice.[69]

France, Italy, Germany, and United Kingdom

The International *Amici* focus special attention on these four western European nations in an attempt to demonstrate that the United States is out of compliance with their practices. However, the

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[66] *Id.* at para. 32 and 67.

[67] CRC Report: Uruguay, CRC/C/URY/CO/2, 5 July 2007, para. 34.

[68] *Id.* at para. 67.

[69] CRC Report: Bulgaria, CRC/C/BGR/CO/2, 23 June 2008, para. 28 and 69(d).

proof they offer actually takes an interesting twist when the balance of Article 37's rules for juvenile sentencing is considered:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time....

A decision of the Supreme Court of Appeal of South Africa demonstrates the extreme nature of these requirements from Article 37. *Director of Public Prosecutions, KwaZulu-Natal v. P* 2006 (3) SA 515 (SCA); [2006] 1 All SA 446 (SCA); 2006 (1) SACR 243 (SCA).

The Constitutional Court of South Africa wrote a summary of this decision:

> [A] twelve year old girl had paid two men to suffocate and then slit the throat of her grandmother, with whom she lived, after she had drugged her. For this act she had furnished the murderers with articles from the deceased's house and offered herself sexually to them. The trial Court had imposed a correctional supervision order, and the State had appealed to the Supreme Court of Appeal. After emphasising the significance of the United Nations Convention on the

> Rights of the Child (the CRC) and section 28 of the Constitution, the Supreme Court of Appeal partially upheld the appeal, concluding that correctional supervision on its own was not severe enough. It held that a sentence of seven years' imprisonment, entirely suspended on condition of P's compliance with a rigorous regime of correctional supervision, was more appropriate. In *P* it was held at para 19 that the Constitution and the international instruments did not forbid incarceration of children in certain circumstances, but merely required that the "'child be detained only for the shortest period of time'" and that the child be "'kept separately from detained persons over the age of 18 years'." The Supreme Court of Appeal noted that it was not inconceivable that some of the courts may be confronted with cases which required detention.[70]

The United Kingdom, Germany, France and Italy do not live up to the standard of Article 37(b) of the CRC. Detention may only be for cases of last resort and only for the shortest period of time possible in the interest of the child. A gruesome murder was not enough to warrant any jail time at all under the CRC, according to the South African courts.

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[70] *M v. The State*, CCT 53/06 [2007] ZAAC 18 (Const. Ct. of S.A.), at p. 7. FN8.

The International *Amici* indicate that the maximum penalty in Germany for a juvenile offender is 10 years.[71] Italy's maximum penalty of 24 years, as indicated by the International *Amici*.[72] France, we are told by these *amici*, imposes a maximum of 16 to 20 years in prison for "juveniles under age 16."[73] This is an intriguing assertion. It leads one to wonder what the maximum penalty is for juveniles over the age of 16. The *amici* do not resolve this mystery in their brief.

It is clear that each of these nations is in violation of the juvenile sentencing standards of Article 37(b). These nations are not sentencing for the shortest period of time possible and only in cases of last resort. In fact, in its most recent report on the United Kingdom, the CRC Committee held the nation to be out of compliance with the CRC's rules on juvenile sentencing. "The number of children deprived of liberty is high, which indicates that detention is not always applied as a measure of last resort."[74]

In Great Britain, juvenile murderers are sentenced under the following provision (Powers of Criminal Courts (Sentencing) Act (U.K., 2000), c. 6, Section 90):

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[71] Int'l *Amici* at 16.

[72] *Id.*

[73] *Id.*

[74] CRC Report: United Kingdom, CRC/C/GBR/CO/4, 20 October 2008, para. 39, 77, 78

> Where a person convicted of murder appears to the court to have been aged under 18 at the time the offence was committed, the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure.

This would appear to violate Article 37. The CRC committee entered a "concluding observation" regarding Nigeria in 1996 which reveals the violation:

> The Committee is also concerned that the provisions of national legislation by which a child may be detained "at Her Majesty's Pleasure" may permit the indiscriminate sentencing of children for indeterminate periods.[75]

The evidence derived from the Committee's reports in 2008-2009 indicates that it believes that virtually every nation that was reviewed in that period was in violation of Article 37's rules on juvenile sentencing.

In 2008 and 2009, the following nations were urged to ensure that their sentencing laws reflected the principle that "children are held in detention only as a last resort": France,[76] Niger,[77]

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[75] CRC Report: Nigeria, CRC/C/15/Add.61, 30 October 1996, para. 21.

[76] CRC Report: France, CRC/C/FRA/CO/4, 11 June 2009, para. 97.

Mauritania,[78] Democratic Republic of Korea,[79] Malawi,[80] the Netherlands,[81] Moldova,[82] Chad,[83] Democratic Republic of the Congo,[84] United Kingdom,[85] Bhutan,[86] Djibouti,[87] Bulgaria,[88]

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[77] CRC Report: Niger, CRC/C/NER/CO/2, 18 June 2009, para. 81.

[78] CRC Report: Mauritania, CRC/C/MRT/CO/2, 17 June 2009, para. 82.

[79] CRC Report: Democratic Republic of Korea, CRC/C/PRK/CO/4, para. 35.

[80] CRC Report: Malawi, CRC/C/MWI/CO/2, 27 March 2009, para. 76.

[81] CRC Report: The Netherlands, CRC/C/NLD/CO/3, 27 March 2009, para. 78.

[82] CRC Report: Moldova, CRC/C/MDA/CO/3, 20 February 2009, para. 73.

[83] CRC Report: Chad, CRC/C/TCD/CO/2, 12 February 2009, para. 86.

[84] CRC Report: Democratic Republic of the Congo, CRC/C/COD/CO/2, 10 February 2009, para. 93.

[85] CRC Report: United Kingdom, CRC/C/GBR/CO/4, 20 October 2008, para. 39, 77, 78.

[86] CRC Report: Bhutan, CRC/C/BTN/CO/2, 8 October 2008, para. 71.

[87] CRC Report: Djibouti, CRC/C/C/DJI/CO/2, 7 October 2008, para. 73.

[88] CRC Report: Bulgaria, CRC/C/BGR/CO/2/ 23 June 2008, para. 69.

Eritrea,[89] Georgia,[90] Sierra Leone,[91] Timor-Leste,[92] and Dominican Republic.[93] Some of these reports appear to be in the nature of admonition; others, like the one for the United Kingdom, are clear findings of present violations.

This is 18 of 24 countries reviewed in this two-year period. Sweden and Bangladesh were criticized for other sentencing violations. Bangladesh was chastised for the use of the death penalty and LWOP.[94] Sweden was condemned for the use of solitary confinement for juvenile offenders.[95] And the remaining four nations—Slovenia,[96] Tunisia,[97]

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[89] CRC Report: Eritrea, CRC/C/ERI/CO/3, 23 June 2008, para. 78.

[90] CRC Report: Georgia, CRC/C/GEO/CO/3, 23 June 2008, para. 71.

[91] CRC Report: Sierra Leone, CRC/C/SLE/CO/2, 20 June 2008, para. 77.

[92] CRC Report: Timor-Leste, CRC/C/TLS/CO/1, 14 February 2008, para. 75.

[93] CRC Report: Dominican Republic, CRC/C/DOM/CO/2, 11 February 2008, para. 87.

[94] See, fn. 48 and accompanying text.

[95] CRC Report: Sweden, CRC/C/SWE/CO/4, 12 June 2009, para. 70.

[96] CRC Report: Slovenia, CRC/C/OPSC/SVN/CO/1, 23 July 2009.

[97] CRC Report: Tunisia, CRC/C/OPAC/TUN/CO/1, 6 February 2009.

Lithuania,[98] and Serbia[99]—were all reporting to the CRC for the first time.

Thus, in 2008-2009 every single nation was admonished regarding the practice of sentencing juvenile offenders—save for the four nations that were reviewed in truncated initial reports. The evidence from the United Nations itself reveals that compliance with the CRC's juvenile sentencing standards is the rare exception and not the rule.

C. Summary Re *Jus Cogens* and Customary International Law

The United States is not the only nation in the world that allows or practices sentencing juveniles to life without parole. At least 23 nations allow LWOP or life imprisonment when we combine the ten nations revealed in the brief of the International *Amici* with those revealed by the reports of the UN Committee on the Rights of the Child. These include the Netherlands, Japan, Australia, Argentina, and China. Belize allows children as young as nine to be sentenced to life without parole. Other nations continue to practice the juvenile death penalty.

Moreover, the *amici* have simply failed to supply this Court with reliable data to determine the actual sentencing laws of any nation other than France, Italy, Germany, and the United Kingdom. Yet these four nations are also in violation of the

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[98] CRC Report: Lithuania, CRC/C/OPSC/LTU/CO/1, 16 October 2008.

[99] CRC Report: Serbia, CRC/C/SRB/CO/1, 20 June 2008.

standards of Article 37 relative to juvenile sentencing—the United Kingdom being formally castigated for this violation in its 2008 review by the U.N. Committee.

Jus cogens has no clear application outside the context of invalidating a treaty that violates some peremptory norm—if it can be finally determined how to recognize such a norm. Moreover, the theory that Article 37's sentencing rules comprise a rule of customary international law fails on both of the *opinio juris* factors. There has been no showing that the practice of States demonstrates widespread compliance with the sentencing standards of Article 37—in fact, the opposite has been demonstrated. And there is no proof that any nation, other than South Africa, feels legally obligated to impose the radical sentencing standards contained in the CRC.

The theory that the sentencing requirements of the CRC are mandatory upon this nation despite our refusal to ratify this treaty is without factual or legal foundation. Moreover, the argument of the International *Amici* that "the uniformity and consistency of international law and practice should inform this Court's Eight Amendment Analysis" simply cannot be sustained because the record of international law and practice is neither uniform nor consistent.

II. The United States is not in Violation of Any Binding Treaty Obligation by Sentencing Juveniles to Life in Prison

The International *Amici* contend that the United States is in violation of "several human rights treaties" to which it is a party. Brief at 24. They initially point to three treaties: International Covenant on Civil and Political Rights (ICCPR)[100], the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[101] (Torture Convention), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[102] This argument is without merit.

Both the ICCPR and the Torture Convention contain similar reservations:

ICCPR:

> That the United States considers itself bound by article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or

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[100] 999 U.N.T.S. 171 (1966), ratified by the United States on June 8, 1992.

[101] 1465 U.N.T.S. 113 (1987), ratified by the United States on Oct. 21, 1994.

[102] 660 U.N.T.S. 195 (1966), ratified by the United States on Oct. 21, 1994.

> Fourteenth Amendments to the Constitution of the United States.[103]

Torture Convention:

> That the United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment", only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[104]

Accordingly, these treaties add nothing to this case. We have not agreed to anything in international law beyond obedience to our own Constitution. This Court need not plumb the depths of international law on these treaties because we have not agreed to adhere to any standard not already imposed by the Constitution.

With regard to the CERD treaty, the Senate made the following reservation: "[T]he United States declares that the provisions of the Convention are not self-executing."[105]

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[103] United Nations Treaty Collection, Chapter IV, No. 4.

[104] United Nations Treaty Collection, Chapter IV, No. 9.

[105] United Nations Treaty Collection, Chapter IV No. 2.

This Court recently said: "A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force." *Medellín v. Texas*, 552 U.S.__, 128 S. Ct. 1346, 1351 (2008).

Accordingly, the CERD treaty has no application in this case concerning the domestic law of the United States.

Finally, the International *Amici* contend that the United States is in violation of the "*corpus juris* of the Organization of American States of which the United States is a member."[106] Whatever implications can be drawn from the *corpus juris*, the United States is not a party to any O.A.S. treaty that has even arguable pertinence. The American Declaration of the Rights and Duties of Man, cited by these *amici*, is not a treaty. The Seventh Circuit made this plain:

> Similarly, the American Declaration of the Rights and Duties of Man, on which the Inter-American Commission relied, is merely an aspirational document that, in itself, creates no directly enforceable rights.

Garza v. Lappin, 253 F.3d 918, 823 (7th Cir. 2001).

The International *Amici* also cite the American Convention on Human Rights, which is an actual treaty. They fail to note, however, that the

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[106] Int'l *Amici* at 19.

United States is not a party.[107] This nation is not bound by a treaty that it has not joined.

III. The Coerced Use of International Law Violates The Principle of Self-Determination

The International *Amici* implore this Court to follow the example of the Declaration of Independence in reaching its decision. With this idea, we fully agree. However, we respectfully suggest that the International *Amici* radically misunderstand the meaning of the Declaration and its applicability to this case.

The International *Amici* attempt to make much of Jefferson's phrase: "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." This does not mean, as the *amici* suggest, that the Declaration's signers employed international law to reach their decision to throw off the shackles of bondage. The whole point of the Declaration was that the American people were finished with the idea of being governed by others from across the sea.

The preceding phrase is the most pertinent. The United States were to "assume among the powers of the earth, the *separate and equal* station to which the Laws of Nature and Nature's God entitle them."

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[107] Brownlie at 571. See also, *Treaties in Force as of January 1, 2009*, United States Department of State.

The basis for our independence was not international law but natural law. And the fundamental purpose of the document was to tell the other nations of the world that we were separate from them and equal to them. Good diplomatic sense says that we would explain our actions to other nations. However, this document stands for the exact opposite of the proposition that America should be governed by the laws and rules of other nations.

It is nearly unthinkable that an array of international organizations would file a brief in this Court arguing that the United States is bound by the Convention on the Rights of the Child, a treaty that it has not agreed to, on the basis of the cumulative effect of the laws of the rest of the world. But the unthinkable becomes bizarre when these *amici* claim that the Declaration of Independence supports this proposition.

We respectfully suggest that the International *Amici* are asking this Court to take action that would violate one of the most fundamental principles of international law. "The right of peoples to self-determination" is one of the principles that most commentators agree falls within the doctrine of *jus cogens.*[108]

The coerced use of international law on an unwilling nation is in itself a violation of a peremptory norm of human rights. Article I Section 1 and the 10th Amendment of our Constitution

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[108] Kadelbach, *supra* at 27. Brownlie at 511.

contain the most important principles. All law-making power for the American people rests in the Congress of the United States, the several states, or the people themselves.

CONCLUSION

For the foregoing reasons the decisions below should be affirmed.

Respectfully submitted this 21st day of September, 2009.

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AMICUS CURIAE BRIEF

Nos. 08-7412, 08-7621

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writs of Certiorari to the District Court of Appeal of Florida, First District

BRIEF FOR SOLIDARITY CENTER FOR LAW AND JUSTICE, THE SOVEREIGNTY NETWORK, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Americans United for Life

Catholic Family and Human Rights Institute

Center for Security Policy

Concerned Women for America

Family Advocacy International

Family Watch International

Freedom Alliance

Hudson Institute

The Cato Institute

The Competitive Enterprise Institute

United Families International

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL UNDERMINE THE DEMOCRATIC PROCESS AND RULE OF LAW	4
A. Florida's Public Officials, its Juvenile Justice Advocacy Groups, and Concerned Florida Citizens Should Be Permitted to Continue to Utilize the Democratic Process to Address the Problem of Increased Youth Violence in Their State	5
B. Neither Non-Binding Treaty Provisions Nor an Insufficiently Definite International Norm Regarding the Sentencing of Juveniles to Life Without Parole Should Serve as a Basis for Determining Whether Florida Juvenile Life Without Parole Sentencing Laws Violate the Eighth Amendment to the United States Constitution	10

TABLE OF CONTENTS

Page

II. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL CREATE UNCERTAINTY ABOUT A MULTITUDE OF U.S. DOMESTIC LAWS 23

III. CONCLUSION 35

APPENDIX

Interests of *Amici* 1a

TABLE OF AUTHORITIES

CASES — Page

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 18
Conroy v. Aniskoff, 507 U.S. 511 (1993) 28
Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ..... *passim*

CONSTITUTION

U.S. Const. Amend. V 14, 15
U.S. Const. Amend. VIII ..... *passim*
U.S. Const. Amend. XIV 14, 15

STATUTES

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Supreme Court Rule 37.2(a) 1

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Page

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TABLE OF AUTHORITIES—Continued

Page

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Page

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STATEMENT OF INTEREST

Americans United for Life, Catholic Family and Human Rights Institute, Center for Security Policy, Concerned Women for America, Family Advocacy International, Family Watch International, Freedom Alliance, Hudson Institute, Solidarity Center for Law and Justice, The Cato Institute, The Competitive Enterprise Institute, The Sovereignty Network, and United Families International hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Respondent. The interests of *amici* are described in detail in the Appendix.[1]

The consideration and adoption of state and federal laws and policies relating to the sentencing of juveniles for the crimes that they commit is an essential undertaking in a democratic society. The United States Congress and the overwhelming majority of states have adopted laws permitting juvenile offenders to be sentenced to life in prison without the possibility of parole. These laws reflect the will of the people and were enacted after due consideration of the nature of, and threats posed by, juvenile criminal activity in modern America, as well as the possibilities for the rehabilitation of juvenile offenders. For this reason, given their steadfast commitment to the democratic process, the rule of law, and national sovereignty, *amici* urge this Court, in deciding this case, not to consider the non-binding provisions of in-

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[1] Letters from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

ternational human rights treaties or an insufficiently definite international norm regarding the sentencing of juveniles to life without parole.

SUMMARY OF ARGUMENT

In the present cases, the citizens of the State of Florida adopted laws through the democratic process that permit the sentencing of juveniles to life in prison without the possibility of parole. By referencing non-binding provisions of international human rights treaties or an international norm regarding the sentencing of juveniles to prison without the possibility of parole as a basis for deciding whether Florida law violates the Eighth Amendment's clause prohibiting cruel and unusual punishments, this Court risks undermining the democratic process and the rule of law and creating uncertainty about a multitude of U.S. domestic laws.

This Court should only allow international law to override domestic law in those cases where the former has been ratified by the domestic political process. If this Court determines otherwise, then, in deciding whether to refer to a purported international norm as a basis for constitutional interpretation, this Court should apply the same test it recently used to determine whether an international norm prohibiting arbitrary arrest and detention could serve as a basis for creating a federal common law claim under the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Specifically, this Court should determine whether the international norm relating to the sentencing of juveniles to life without parole is sufficiently definite to be used as a basis for constitutional interpretation. This test, which was used in by the Court in *Sosa* to determine whether, in the absence of statutory authority for a cause of

action, an international norm can be used to create a federal common law action, is no less appropriate in the present cases, where this Court must decide whether to use a purported international norm to overturn existing domestic statutes that have been enacted at the state and Federal levels.

Applying the "defined with specificity" test, there is little doubt that no sufficiently definite international norm exists that can serve as a basis for determining that the Florida juvenile life without parole sentencing law violates the Eighth Amendment. The international norm relating to sentencing juveniles to life without parole has not attained the status of customary law because: 1) there is only general, "high-level" authority cited for the norm; 2) the implications of enforcing such a broad norm are "breathtaking;" 3) enforcement of the norm would supplant United States domestic laws; and 4) there is a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses (violations of safe conducts, infringement of the rights of ambassadors, and piracy).

If this Court relies on a non-binding provision of an international treaty or an insufficiently definite international norm to overturn Florida juvenile life without parole sentencing laws and, consequently, comparable Federal law and laws in over 40 states, serious questions will arise regarding the long-term viability of the democratic process and rule of law. Additionally, uncertainty will be created about a multitude of other U.S. domestic laws relating to human rights.

ARGUMENT

I. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL UNDERMINE THE DEMOCRATIC PROCESS AND RULE OF LAW

The citizens of the State of Florida have adopted laws through the democratic process that permit the sentencing of juveniles to life in prison without the possibility of parole. They did so after taking into consideration trends in juvenile crime and after weighing different options regarding the incarceration of juveniles and the likelihood for rehabilitation that would enable them to serve as functioning citizens in their later lives.

Although it is important for this Court to evaluate whether Florida juvenile sentencing laws violate the Eighth Amendment's clause prohibiting cruel and unusual punishments, this Court should refrain from considering, citing, or otherwise referencing non-binding provisions of international treaties or an insufficiently definite international norm as a basis for its decision. Doing so would undermine the democratic process in Florida and across the United States and create a great deal of uncertainty regarding the continued validity of laws relating to a multitude of human rights.

A. Florida's Public Officials, its Juvenile Justice Advocacy Groups, and Concerned Florida Citizens Should Be Permitted to Continue to Utilize the Democratic Process to Address the Problem of Increased Youth Violence in Their State.

Juvenile crime is a significant problem in the United States. In 2008, persons under the age of 18 committed 11.9% of the 459,553 violent crimes and 18.4% of the 1,306,464 property crimes cleared by law enforcement officials. Federal Bureau of Investigation, Table 28. In Florida, murder/manslaughter referrals in the case of juvenile offenses increased 55%, from 84 referrals during fiscal year 2003-2004 to 130 referrals during fiscal year 2007-2008. During the same period, attempted murder/attempted manslaughter referrals increased 50%, from 46 to 69 and armed robbery referrals increased 103%, from 708 to 1,434. Florida Department of Juvenile Justice 1.

Despite these discouraging statistics, since 1994, Florida citizens have dutifully examined their juvenile justice system and pursued necessary reforms. Florida elected officials, state juvenile justice officials, business leaders, juvenile justice policy advocates, human rights advocates, education leaders, youth representatives, parents of detained juveniles, and victims' rights organizations have participated in these democratic deliberations.

- The Juvenile Justice Act of 1994 created the Florida Department of Juvenile Justice, which is responsible for planning and managing all programs and services in the juvenile justice system.

- In 1994, the Florida Juvenile Justice Association was created. The Association promotes public awareness and education on juvenile justice issues; contributes to the development of public policy regarding juvenile justice issues; supports evaluation and research of juvenile justice issues; and provides training, technical assistance and consultation to Association members and related parties.
- Since 1999, the National Council of Juvenile and Family Court Judges ("NCJFCJ") has conducted 74 training sessions in Florida for more than 12,500 judges, magistrates, commissioners, attorneys, and other juvenile and family court-related professionals. The training activities were undertaken by the NCJFCJ over the past ten years to support and enhance widespread systemic reforms and facilitate the achievement of better outcomes for Florida's children and families. As of 2009, NCJFCJ has 64 members in Florida out of a nationwide membership of over 1,900.
- In 2000, the Florida Juvenile Justice Foundation, Inc. was formed to serve as a Direct Support Organization for the Florida Department of Juvenile Justice. Among other things, the Foundation fosters collaboration among business people, community members, parents, youths and Florida's juvenile justice system.
- In July 2007, Florida Governor Charlie Crist authorized creation of a Blueprint Commission as a time-limited workgroup charged with developing recommendations to reform Florida's juvenile justice system. The Blue-

print Commission's 25 members traveled the state, held public hearings, and received testimony from a host of stakeholders—community leaders, law enforcement and court officers, representatives of the public school system, health and mental health officials, parents, youth, advocates, national experts in juvenile justice, and department staff.

- In January 2008, after conducting a thorough examination of the state of juvenile justice in Florida, the Blueprint Commission produced its report, *Getting Smart About Juvenile Justice in Florida*. Working with expert advisors, the members of the Commission, consisting of representatives from law enforcement, civil and human rights, education, juvenile justice, and business organizations, identified 52 recommendations for change, organized under seven guiding principles and 12 key goals designed to be implemented over multiple years.
- During the 2009 session of the Florida House of Representatives, several representatives introduced House Bill 757, the Second Chance for Children in Prison Act of 2009. The Act, which was never passed out of committee, provided that an offender 15 years of age or younger who is sentenced to life or more than 10 years in prison is eligible for parole if he or she has been incarcerated for a minimum period and has not previously been convicted or adjudicated of, or had adjudication withheld, for certain offenses.

Perhaps, after further deliberation among Florida citizens and their duly elected representatives, HB 757 will become law and, perhaps, in the future, the sentencing of juveniles to life without parole will no longer be a part of the Florida legal landscape. It is also possible that Florida's elected officials serving in the United States House of Representatives will choose to support H.R. 2289, the Juvenile Justice Accountability and Improvement Act of 2009. H.R. 2289, introduced on May 6, 2009, is designed to establish a meaningful opportunity for parole or similar release for juvenile offenders sentenced to life in prison.

This Court should respect the democratic process as it is unfolding in Florida, other states, and in the United States Congress. It should resist the urge to refer to the provisions of non-binding international treaties or an insufficiently definite international norm to overturn a majority of state and federal laws relating to the sentencing of juveniles to life without parole. State officials enacted these laws to address valid concerns regarding increases in juvenile offenses and are reviewing their merit in light of sentencing outcomes. When it comes to fashioning juvenile justice solutions with an eye toward human rights concerns, "there is no reason to think that national institutions in a constitutional democracy are unfit to ultimately and authoritatively determine these rules for themselves." Kumm 23-24.

Florida has unique historic, public safety, legal, development, cultural, economic, political, and social concerns relating to the issues of youth violence and juvenile justice. There have been, and will be, regular opportunities for meaningful participation among the various stakeholders involved in the issue of juvenile

life without parole sentencing. Florida citizens can hold elected and other public officials accountable for failed or unjust juvenile justice policies.

Due to the relatively violent nature of American society, the United States and the State of Florida have been at the vanguard dealing with the issues of youth violence and juvenile justice. Few, if any, other developed nations and their political subdivisions have had to address these issues to the same extent and in the same context as has been the case in the United States, in general, and Florida, in particular. Meanwhile, in at least eleven countries, including Australia, the life without parole sentence is available with respect to juveniles. Also, many countries allow sentences of long durations for juvenile offenders. Other countries have agreed to prohibit the sentence, but have not done so in practice. Grossman and Stimson 39.

The fact that high-level government officials from foreign countries have ratified international human rights treaties that contain vague provisions relating to the sentencing of juveniles provides scant evidence that their citizens have seriously considered the merits of such prohibitions in a context comparable to that which exists in Florida and the United States. "International law, both formally and practically, represents the consensus of states, not people, and thus there is much less reason to think it should trump or even cast doubt on the judgments reached by democratic deliberations in particular nations." McGinnis 312.

B. Neither Non-Binding Treaty Provisions Nor an Insufficiently Definite International Norm Regarding the Sentencing of Juveniles to Life Without Parole Should Serve as a Basis for Determining Whether Florida Juvenile Life Without Parole Sentencing Laws Violate the Eighth Amendment to the United States Constitution.

This Court should only allow international law to override domestic law in those cases where the former has been ratified by the domestic political process. Under a modern conception of international custom, many scholars embrace a methodology that permits substantial human rights norms to be encompassed within customary international law. Instead of requiring that nation-states actually engage in a practice, they substitute statements by nation-states that give the norms verbal endorsement. These include resolutions of the General Assembly of the United Nations and multilateral treaties. Under the modern conception, "customary international law suffers from a democracy deficit and is therefore likely to produce lower quality norms than a democratic domestic political process." McGinnis and Somin 1201.

This democracy deficit is created by: 1) the large role played by unrepresentative and unaccountable "publicists," including elite international law professors and non-governmental organization leaders in the United States, who determine what level of practice is required to support an international norm; 2) the non-democratic governments that participate in the negotiation of international human rights treaties; 3) the failure of democratic nations to

voluntarily incorporate the international norms to displace their domestic laws; and 4) the inability of uninformed citizens to monitor or control the individuals and institutions responsible for international law fabrication, which exacerbates the potential for interest group influence and manipulation by elites. *Id.* 1202-1211.

To avoid this democracy deficit, this Court should leave it to the political branches to decide whether to incorporate international law into domestic law through the ordinary legislative processes that ensure democratic control over lawmaking. "In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 747 (2004) (Scalia, J., concurring in part and concurring in the judgment).

If, however, this Court is inclined to rely on international law as a basis for deciding these cases, it should use the test recently employed by the Court in *Sosa* to determine whether to recognize private claims under federal common law for violations of an international norm.

In *Sosa*, the Court explained that it is limited in its ability to recognize international law norms to create substantive rights that can give rise to private claims under federal law:

> We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. . . . Several times,

> indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.

Id., at 728, *citing*, 138 Cong. Rec. 8071 (1992). Yet, in certain limited cases, even without relying on the provisions of international human rights treaties, independent judicial recognition of actionable international norms is possible: "[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less than definite content and acceptance among civilized nations than the historical paradigms familiar" when the jurisdictional statute giving rise to such violations was enacted. *Id.* at 732.

Thus, in *Sosa*, the Court held that the Alien Tort Statute authorized federal courts to recognize federal common law causes of action based on an international law norm only if the norm in question is "defined with specificity" comparable to the historic law of nations norms.

The "defined with specificity" test is designed to make certain that the international opinion and practices that give rise to the norm are rooted in facts and policies that have been developed, agreed upon, and implemented at the national level. That is, the international norm must manifest a solidarity achieved through respect for the subsidiarity principle. It is not enough that the "international community" recognizes the norm. Instead, there must be evidence that the norm is universally recognized due to the fact that it has attained such status as a result of

actual democratic discourse, deliberation, and development.

Under the "defined with specificity" test, the Court first considers whether the United States is obligated to respect the international norm under any applicable international human rights declaration or treaty. If a declaration consists only of a statement of principles, no such obligation exists. If, in ratifying a treaty, the United States made reservations that make the international norm inapplicable, no such obligation exists. In the absence of any binding declaration or treaty provision, there is no evidence that the norm has been adopted through the democratic process as manifested in the approval of the U.S. Senate by at least two-thirds of its members. In such cases, the Court then considers whether, regardless of the lack of a binding declaration or treaty provision, the international norm has attained the status of binding customary international law. If the international norm consists of a general prohibition with limited specificity as to its content, authority must be cited that "a rule so broad has the status of a binding customary norm today." *Id.*, at 736.

In *Sosa*, the Court considered whether the international norm prohibiting arbitrary arrest and detention was sufficiently definite to support a cause of action under the Alien Tort Statute. First, the Court rejected the claim that two international human rights agreements to which the United States is a party provided definite content regarding the scope of the norm. It dismissed as having little utility the prohibition against arbitrary arrest contained in the Universal Declaration of Human Rights (the "Declaration") and a similar prohibition contained in the International Covenant on Civil and Political Rights

(the "ICCPR"). The Court determined that "the Declaration does not of its own force impose obligations as a matter of international law," instead sharing Eleanor Roosevelt's view that the Declaration constitutes "a statement of principles . . . setting up a common standard of achievement for all peoples and nations." *Id.*, at 734 (citation omitted). As for the ICCPR, the Court determined that, although the treaty binds the United States as a matter of international law, the United States "ratified the ICCPR on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.*, at 735. As a result, the Court rejected the assertion that the Declaration and ICCPR themselves established the relevant and applicable rule of international law.

Similarly, in the present case, the United States' reservations to the ICCPR effectively counter any claims that specific articles of the ICCPR provide the definite content necessary to prohibit the sentencing of juveniles to life without parole, a right not specifically contained in the ICCPR.

Article 7 of the ICCPR contains a general prohibition on "cruel, inhuman or degrading treatment or punishment" without defining or further elaborating upon the meaning of the phrase. As it turns out, the United States submitted a reservation to Article 7 specifying that the United States would only be considered bound by that provision "to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." As a result, Article 7 (to the extent executed) cannot impose any additional obligations

on the United States beyond those already required by the Fifth, Eighth, and Fourteenth Amendments, none of which has been interpreted to prohibit sentencing juveniles to life without parole.

Whether Article 7's prohibition on "cruel, inhuman or degrading treatment or punishment" would encompass the sentencing of a juvenile to life without parole remains an open question, a question that is debated every four years when the U.S. submits its report to the United Nations Human Rights Committee, which oversees the implementation of the ICCPR. As concerns the domestic law of the United States, however, the question is moot because of the reservation and the treaty's non-self-executing status.

Claims that Articles 10 and 14 of the ICCPR prohibit such sentences are likewise unsupported. Article 10(3), which addresses permissible conditions of confinement, declares, "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Article 14 does not deal with sentencing or conditions of confinement, but rather addresses criminal procedure. Specifically, regarding juveniles, it states, "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

As with Article 7, the United States entered a specific reservation regarding Articles 10 and 14, expressly reserving "the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14." Moreover, to make clear to the Human Rights Committee and the other ICCPR States Parties regarding U.S. views concern-

ing incarceration, the United States entered a separate understanding that states: "The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system."

Read together, these reservations and understandings eviscerate the argument that either Article 10 or Article 14 obliges the United States to cease sentencing juveniles to life imprisonment without parole. Notwithstanding any broad interpretation of the text of these articles, the United States' reservation contemplates that juveniles may be tried and sentenced the same as adults under "exceptional circumstances," presumably for heinous crimes such as murder and other violent felonies, and that they may be imprisoned for the purposes of "punishment, deterrence, and incapacitation," all of which are significantly furthered by the sentence of life without parole.

In *Sosa*, once the Court established that the United States was not obligated to adhere to any prohibition against arbitrary arrest contained in an international declaration or treaty to which it was a State Party, the Court considered whether the prohibition of arbitrary arrest had independently attained the status of binding customary international law. In doing so, it focused on whether the norm constituted a binding customary rule with specificity as to content, or, to the contrary, merely expressed an aspiration that this Court could not rely upon in "[c]reating a private cause of action to further that aspiration . . . ." *Id.*, at 738.

In *Sosa*, the respondent Alvarez invoked a general prohibition of "arbitrary" detention defined as offi-

cially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. For several reasons, the Court determined that such a norm was too broad and indefinite to attain the status of binding customary law. It focused on the fact that only "high-level" general authority was cited as the basis for the norm; the "breathtaking" implications of enforcing the norm; the fact that enforcement of the norm would supplant domestic law; and the lack of a factual basis for determining which policies cross the line into an arbitrary arrest with the certainty afforded by the three common law offenses of violations of safe conducts, infringement of the rights of ambassadors, and piracy.

First, the Court noted that Alvarez cited little authority that a rule against arbitrary arrest has the status of a binding customary norm, explaining that a survey of national constitutions on which he relied as evidencing adherence to the norm "does show that many nations recognize a norm against arbitrary detention, but that consensus is at a high level of generality." *Id.*, at 736 n.27. If, instead of a survey pertaining to national constitutions, Alvarez had cited a survey of actual laws passed at the state level through democratic consideration of the issue, the Court may have found a more definite norm that rose to the level of customary international law.

Second, the Court considered the implications of a general prohibition on arbitrary arrest, regardless of the circumstances of the arrest. The Court noted that the rule proposed by Alvarez would support a cause of action in federal court "for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would

create a cause of action for any seizure of an alien in violation of the Fourth Amendment . . . ." *Id.*, at 736.

Third, the Court considered the effect that adoption of the norm would have on United States domestic law relating to arbitrary arrest, noting that it would create a cause of action "supplanting the actions under . . . 42 U.S.C. §1983 and *Bivens v. Six Unknown Fed. Narcotics Agents* . . . that now provides remedies for such violations." *Id.*, at 736-37. Such a broad rule would create an action in federal court for arrests made by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest.

Finally, the Court explained that "[a]ny credible invocation of an international norm that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority." *Id.*, at 737. The mere reference to a general norm against arbitrary arrest provides no factual basis for determining which "policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race." *Ibid.* In short, the norm had not been developed through practical experiences considered and addressed within the democratic process. In this regard, it is an especially formidable task for judges to consider the factual underpinnings of an international norm.

> To understand whether a foreign law casts doubt on the wisdom of our own law, one would have to undertake a systematic comparative enterprise of the two different cultures and legal systems to determine whether the other legal culture had sufficiently good methods of rule generation, and

> whether the systems were sufficiently alike that it made sense to conclude that the difference between their rules and ours on an issue cast doubt on the beneficience of ours. The question is not strictly a legal one but demands comparative cultural sociology as well as comparative law.

McGinnis 325.

Because, as was the case in *Sosa* with respect to arbitrary arrest, in the present case, the United States is not bound by any limits on the sentencing of juveniles to life without parole that is contained in an international declaration or treaty to which it is a party, it is necessary to determine whether such an international norm has been defined with the level of specificity required by the Court to be considered customary international law. Just as the international norm prohibiting arbitrary arrest was not sufficiently definite to attain the status of a binding customary norm that could be used to create a federal remedy, the international norm relating to the sentencing of juveniles to life without parole is not sufficiently definite to attain the status of a binding customary norm that can be used by this Court to interpret whether such a sentence violates the Eighth Amendment.

Application of the same test used by the Court in *Sosa* supports that conclusion. In essence, the international norm prohibiting the sentencing of juveniles to life without parole has not attained the status of binding customary law because: 1) there is only general, "high-level" authority cited for the norm; 2) the implications of enforcing such a broad norm are "breathtaking;" 3) enforcement of the norm would supplant United States domestic laws; and 4) there is

a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses.

First, there is only general, "high-level" authority for the international norm relating to the sentencing of juveniles to life without parole. The primary authority for the norm is contained in Article 37(a) of the United Nations Convention on the Rights of the Child ("CRC"), a treaty to which the United States is not a party.

Article 37(a) of the CRC provides that:

> States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

UN Convention on the Rights of the Child, Art. 37(a). During the drafting stages of Article 37(a), in late 1988, a special Working Party session of the Commission on Human Rights reported that there was a lack of consensus on whether Article 37(a) should contain a blanket prohibition on both capital punishment and life imprisonment without the possibility of release. As explained by a leading commentary on Article 37(a), although, at the time of the report, the prohibition of torture and of capital punishment for juveniles could hardly be contested as norms of existing human rights treaty law, "the reference to life imprisonment was very much a matter of progressive development of the law, and no prior text existed on this subject." Sax and Schabas 10.

Thus, at the time of the adoption of the CRC in 1989 and its entering into force in 1992, there was no evidence of the existence of an international consensus as to whether, and under which circumstances, sentencing juveniles to life without parole violated the law of nations. Other than the general, high-level authority contained in Article 37(a), the main authorities cited for the international norm prohibiting the sentencing of juveniles to life without parole are a myriad of United Nations resolutions and many national constitutions. The citing of such general, high-level authorities for an international norm against the sentencing of juveniles to life without parole suffers the same democratic deficiency as did the general, high-level authority cited for the international norm on arbitrary arrest in *Sosa*.

Second, the implications of enforcing such a broad norm would be, according to the analysis in *Sosa*, "breathtaking." If this Court enforced Article 37(a) of the CRC, the sentencing of *any* juvenile to life without parole anywhere in the United States would be completely prohibited, regardless of the heinous nature of the crime; whether the juvenile was a repeat, violent offender; the age and maturity level of the offender; the proven psychological or other anti-social disposition of the offender; the degree of violent crimes being committed by juveniles in that particular state; the failure to rehabilitate prior similar offenders outside of the correctional system; or the conditions of lifetime confinement.

Third, the enforcement of such a broad, indefinite norm relating to the sentencing of juveniles to life without parole would supplant and overturn laws permitting such sentencing in over 40 U.S. states and at the federal level, which flies in the face of the

democratic process. Such an action would not comport with the traditional view of international law within the U.S. legal system. "International law is a system of treaties, agreements, and customs created in large part outside this representative system, untested by the pluralistic forces that drive the legislative and executive branches. The use of international sources introduces new players and new forms of "legislation" into the carefully balanced Madisonian system." Turley 193.

Finally, there is a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses of violations of safe conducts, infringement of the rights of ambassadors, and piracy. Obviously, for a norm relating to the sentencing of juveniles to life without parole to attain a level of definiteness that would give rise to customary international law, consideration would have to be given at the national level to the question of which crimes committed by juvenile offenders warrant such sentencing. This is the factual determination in which this Court is engaged in the present cases and, in deciding these cases, this Court should not rely in whole or in part on an international norm that has not itself been developed on a similar factual basis.

In short, the purported international norm prohibiting the sentencing of juveniles to life without parole suffers the same defect expressed by the Court in relation to the purported international norm advanced by Alvarez in *Sosa*; "in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.*, at 738.

By relying on an insufficiently definite international norm as a basis for determining whether the juvenile life without parole sentence violates the Eighth Amendment, this Court would be condoning an outcome similar to the one specifically rejected in *Sosa*—the recognition of a federal common law cause of action based on an international norm that was "created" at a general, high-level; that has broad implications for American jurisprudence; that supplants domestic laws enacted through the democratic process; and that has not been generated with consideration for the facts which would dictate a more specific, narrowly-tailored policy.

Even worse, in the present cases, instead of merely creating a federal common law action where there is no existing statute, this Court would be using an insufficiently definite international norm to overturn existing statutes.

II. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL CREATE UNCERTAINTY ABOUT A MULTITUDE OF U.S. DOMESTIC LAWS

The Court has made it clear that "the determination of whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that norm available to litigants in the federal courts." *Sosa*, at 732-33 (footnote omitted). Likewise, the determination of whether a non-binding international treaty provision or customary international law norm is sufficiently

definite to be referred to by this Court as a basis for overturning a majority of state and Federal juvenile life without parole sentencing laws must involve an element of judgment about the practical consequences of recognizing the norm for that purpose.

By referring to a non-binding treaty provision or an insufficiently definite international norm as a basis for interpreting the Eighth Amendment and overturning a majority of state and Federal juvenile life without parole sentencing laws, this Court would create a great deal of uncertainty about many U.S. domestic laws involving human rights. Many international human rights treaties contain general, undefined aspirations, not specific, detailed obligations. The language of such treaties is far less precise than the language that any State party would contemplate using to draft a statute.

> Parties in the past often drafted customary international law outputs without an understanding or expectation that it could create legally enforceable standards. Yet NGOs can now use broad aspirational commitments as a means of imposing legal duties. Second, unless and until adversely affected individuals become aware of potential liabilities, NGOs can continue to lobby for broad customary law outputs.

Kochan 2004, 275.

This is why, unless two-thirds of the U.S. Senate gives its consent to ratification of a treaty with the necessary reservations, understandings, and declarations, it does not become binding on the United States. Also, unless a treaty is self-executing, additional implementing legislation passed by Con-

gress and signed by the President is required to make the treaty provisions actionable at law.

For instance, the CRC, a treaty that has not even been considered for advice and consent by the U.S. Senate, covers a wide range of issues relating to purported civil, political, economic, social and cultural rights of children.

The rights listed in the CRC include, but are not limited to: the right to life; the right to preserve one's identity, including nationality; the right to leave one's own country and to enter another country for the purpose of being reunited with one's parents; the right to freely express one's views and the opportunity to be heard in judicial or administrative proceedings; the right to expression, including the freedom to seek, receive and impart information and ideas of all kinds, "regardless of frontiers;" the right to freedom of thought, conscience, and religion; the right to freedom of association and assembly; the right to privacy; the right to access to information and material from "a diversity of national and international sources;" the right to adoption; the right to a safe family environment; the right to enjoy the highest attainable standard of health; the right to an adequate standard of living; the right to education; the right to practice one's own religion and use one's own language; the right to rest, leisure, and play; the right to be protected from economic exploitation; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; and the right not to suffer capital punishment or life imprisonment without possibility of release.

If this Court refers to Article 37(a) of the CRC to support its decision to overturn the juvenile sentencing laws of Florida and over 40 other U.S.

states, in subsequent cases, will this Court overturn federal restrictions on immigration by reference to a child's right under the CRC to leave his or her country and enter another country to be reunited with his or her parents? Require the teaching of comparative religion in public schools by reference to the right under the CRC to seek and receive information and ideas of all kinds? Overturn state laws requiring a minor to secure parental consent prior to having an abortion by reference to the CRC's right to privacy for children? Overturn state bans on the adoption of children by same-sex couples by reference to the CRC's right to adoption? Mandate the unlimited provision of government-funded health care to all children by reference to the CRC's right to health care? Require state and local governments to increase their spending on public schools by reference to the CRC's right to education? Require public schools to educate children in their native languages by reference to the CRC's requirement that children be permitted to use their own language?

Although the terms of the CRC do not authorize them to do so, the 18 independent expert members of the Committee on the Rights of the Child interpret provisions of the CRC and publish non-binding General Comments suggesting the substance of the various rights. The areas covered by the Committee's published General Comments include, but are not limited to, the aims of education; HIV/AIDS and the rights of the child; adolescent health; implementing child's rights in early childhood; the right of the child to protection from corporal punishment and other "degrading" forms of punishment; the rights of children with disabilities; children's rights in juvenile justice; the rights of indigenous children; and the right of the child to be heard.

The General Comments are derived in part from the Committee's observations and conclusions made in connection with the reports that States parties to the CRC must file with the Committee every five years. Based on documentation submitted by relevant United Nations bodies and specialized agencies and non-governmental organizations that are familiar with children's rights issues in the country under review, a Committee working group determines the most important issues to be discussed with the representatives of the States. During their regular sessions, the Committee examines the State reports together with government representatives. The Committee then publishes its concerns and recommendations in "concluding observations," in which it sets out whether or not the reporting State was acting in conformity with its treaty obligations. The reporting State may provide a response to the Committee's concluding observations. In the State's report five years later, the Committee expects the reporting State to provide follow-up information regarding the problems highlighted in the previous concluding observations.

Thus, between the list of rights contained in the provisions of the CRC, the General Comments promulgated by the Committee, and the Committee's concluding observations on States' reports, there is a significant body of human rights resource materials to which this Court could arguably refer to as a basis for its decisions to overturn U.S. laws and policies relating to children's rights. But should it?

"Some claim that problems arise when treaties create institutions in which unelected officials in conjunction with other actors may create new obligations, which, at the time the treaty was signed, were

impossible to foresee." Kumm 14. At the time that the CRC was adopted in 1989, was it foreseeable that the 18 international experts of what was only intended to be a technical monitoring committee would examine the substance of the CRC's provisions; interpret them (with the assistance of unelected and unaccountable United Nations officials and representatives of non-governmental organizations); publish regulation-like General Comments defining the scope of the rights and explaining the manner in which States parties should implement them; audit the domestic laws and policies of States parties every five years to determine whether they are in "compliance;" publish a concluding report with observations about the status of children's rights in the country; encourage non-governmental organizations to use that report to shame even the most progressive governments into funding the immediate realization of every right of the child imaginable; and embark on a systemic campaign to convince national, regional, and international court judges to cite the rights of the child and General Comments as authority for their decisions?

Unfortunately, the provisions of the CRC and the dictates of the Committee on the Rights of the Child are only two of the many "friends at the cocktail party" to which this Court might look if it intends to "globalize" the United States Constitution.[2] There are other international human rights treaties, institutions, and organizations that, with the CRC

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[2] "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993), Scalia, J. concurring in the judgment. See Kochan 2006, 542-546.

and the Committee, form a matrix of human rights governance networks to which the United States could become subject should this Court continue its recent practice of referring to the provisions of such treaties as a basis for its decisions. *See* Kelly.

The International Covenant on Economic, Social and Cultural Rights ("ICESCR"), to which the United States is not a party, contains many established, emerging, and undefined norms that, if recognized by the Court, would impact existing U.S. domestic laws and policies, including, but not limited to, purported norms such as: the right to work; the right to fair wages; the right to join a union; the right to social security; the right to an adequate standard of living, including food, clothing and housing; the right to the highest attainable standard of physical and mental health; the right to education; and the right to the benefits of scientific progress. In addition, the Committee on Economic, Social and Cultural Rights has promulgated a General Comment setting forth the nature and scope of a right to water, though such a right is not expressly contained in the ICESCR.

The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), to which the United States is not a party, contains many worthy, though broad, open-ended, and undefined, aspirations regarding the rights of women that, if recognized and enforced by the Court, would directly impact existing U.S. domestic laws and policies. These include, but are not limited to: that the principle of the equality of men and women be embodied in national constitutions or other appropriate legislation; that States take all appropriate measures to ensure the full development and advancement of women, including legislation, in all fields, in partic-

ular the political, social, economic and cultural fields; that States take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to eliminating prejudices, customary practices, and stereotypes regarding men and women; and that States take all appropriate measures to ensure that there is no discrimination against women and equality between men and women in the fields of political life and public service (both domestic and international), education, and employment, health care, and all other areas of economic and social life.

For the express purpose of considering the progress made in the implementation of CEDAW, the treaty provided for the creation of the Committee on the Elimination of Discrimination against Women (the "CEDAW Committee"). As has been the case with all human rights treaty bodies, the CEDAW Committee has morphed into a quasi-rule making body, which has produced 26 General Recommendations against which the performance of States parties on domestic laws and policies involving women's rights is measured to determine compliance with CEDAW. States parties to CEDAW are required to report to the CEDAW Committee on measures that they have taken to implement the provisions of CEDAW into their domestic laws and policies. The CEDAW Committee produces a final report in which, after commending the State party for whatever positive steps it has taken in regards to CEDAW, the experts on the CEDAW Committee detail the various ways in which the State party is failing to honor the CEDAW provisions. Non-governmental organizations, who assist the CEDAW Committee members with their investigation of the State party and who submit "shadow" reports detailing alleged shortcomings of

the State party, are able to use the CEDAW Committee's final report to publicly shame the State party and raise money for the NGO's next foray into the building of customary international law. International Women's Rights Action Watch 1. This enables NGOs to avoid messy, and often unsuccessful, attempts to influence constitutional and legislative changes at the state and national level through democratic means.

Of course, in the eyes of some NGOs, to have the Court conveniently reference a human rights treaty (*any* such treaty) as a basis for one of its decisions is a victory of incalculable value, regardless of whether the United States is a party to the treaty.

> NGOs, like other entities, act as interest groups focused on maximizing private benefits. In seeking the production of customary international law outputs for use in future litigation, NGOs will not necessarily be seeking specific outcomes from each output; but rather, these outputs can result in the production of tools for use in other forums.

Kochan 2004, 263.

The reporting processes relating to two international human rights treaties to which the United States is a party evidence the manner in which treaty body committees and NGOs partner to influence U.S. civil and human rights laws and policies outside the regular channels for democratic participation. These two treaties are the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD") and the ICCPR.

The Committee on the Elimination of Racial Discrimination ("CERD") is responsible for receiving

and considering periodic State party reports under ICERD. In its February 2008 report regarding the United States, the CERD set forth a list of recommendations that, if adopted or otherwise recognized by the Court, would result in the *de facto* transfer to the CERD of supervisory authority over state and federal responsibilities and measures for addressing racial discrimination in both public and private settings.

In its 2008 report, the CERD recommended that the United States: change its definition of racial discrimination used in federal and state legislation to include indirect, or *de facto*, discrimination; broaden the protection afforded by the law against discriminatory acts by private individuals, groups or organizations; establish an independent human rights institution; strengthen its efforts to combat racial profiling and adopt federal legislation to that end; not discriminate against non-citizens, particularly in the fight against terrorism; adopt and implement federal and state legislation to combat discrimination in housing; enact legislation to enable school districts to promote school integration; prohibit the expression of all ideas based upon racial superiority or hatred; design and implement strategies for the elimination of structural racial discrimination in the criminal justice system; discontinue the sentencing of juveniles to life without parole; allocate sufficient resources to provide for the legal representation of indigent persons; adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries, and lawyers; report to the CERD on the results of measures taken to prevent and punish violence and abuse against women belonging to minorities; automatically restore the

right to vote of those who have completed criminal sentences; explore ways to hold transnational corporations registered in the United States accountable for negatively impacting the rights of indigenous peoples outside the United States; report to the CERD on the results of measures taken to remedy obstacles that prevent or limit the access of minorities to adequate health care; continue to address racial disparities in sexual and reproductive health, including access to adequate contraception and family planning; and adopt all appropriate measures to reduce the persistent "achievement gap" between minority and white students in education. *See* Groves.

Meanwhile, the human rights regime under the ICCPR has resulted in an unwarranted and unauthorized intrusion into United States domestic and foreign policy. In its December 2006 concluding observations regarding the United States, the ICCPR's Human Rights Committee ("HRC") requested the United States to provide information and take action regarding a number of issues. Most of the HRC's requests for follow-up information concerned matters outside the territory of the United States, even though the ICCPR explicitly does not apply outside the territory of a State party. Nevertheless, the Government of the United States submitted comments to the HRC addressing the matters raised in the HRC's concluding observations, primarily matters relating to the United States' engagement in an armed conflict with al Qaida, the Taliban, and their supporters.

The HRC's investigation of matters outside the territory of the United States, involving armed conflict with terrorists, provides compelling evidence in support of the U.S. Senate's wisdom in having rati-

fied the ICCPR with five reservations, five understandings, and four declarations, and in having not ratified other international human rights conventions. Fortuitously, the United States declared that the provisions of Articles 1 through 27 of the ICCPR are not self-executing, thereby enabling the citizens of the United States and their elected officials to respond to the unforeseeable war against global terrorism within the confines of the United States Constitution and duly enacted federal legislation, and without the interference of unelected and unaccountable international committees.

In sum, by referencing Article 37(a) of the Convention on the Rights of the Child or provisions of other international human rights treaties as a basis for its decision in these cases, this Court would be undermining the ability of the United States to govern its internal affairs democratically, without the involvement of unelected and unaccountable "experts" working with United Nations treaty body committees in Geneva. When, at any time, a majority of the Justices of this Court can refer to a provision of a non-binding international human rights treaty or an insufficiently definite international norm and thereby end all state and national democratic discourse, deliberation, and decision-making in regards to ultimate questions of civil, political, economic, social, and cultural rights, the democratic process and the rule of law are in great jeopardy.

III. Conclusion

For the foregoing reasons, this Court should affirm the judgments of the Florida First District Court of Appeal.

Respectfully submitted,

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APPENDIX

APPENDIX

Interests of *Amici*

Americans United for Life is a nonprofit, public-interest law and policy organization whose vision is a nation in which everyone is welcomed in life and protected in law. The first national pro-life organization in America, AUL has been committed to defending human life through vigorous judicial, legislative, and educational efforts state by state since 1971. **William L. Saunders** is Senior Vice President of AUL.

Catholic Family and Human Rights Institute is a New York and Washington DC-based research institute concerned with international social policy, particularly in the areas of life and family issues. While C-FAM is agnostic on the underlying issue of juvenile sentencing, C-FAM is deeply concerned with the threat to democratic institutions that comes through the misuse of international treaties in the creation of supposedly new international norms such as is happening with the case under review here. **Austin Ruse** is the President of C-FAM.

Center for Security Policy specializes in identifying policies, actions, and resource needs that are vital to American security. A fundamental precondition for the exercise of national power, of course, is the maintenance of U.S. control over the decision-making process—in short, sovereignty. The Center's Sovereignty Project seeks to revitalize the determination of American leaders to develop policies free from undue international influence and to prevent the establishment of global government. **Frank J. Gaffney, Jr.** is the President and CEO of the Center for Security Policy.

Concerned Women for America is a non-profit public policy organization representing 500,000 people nationwide. One of its core issues is to protect America's sovereignty from the unconstitutional application of international law, treaties or norms. **Wendy Wright** is President of CWA.

Family Advocacy International is a non-profit organization with substantial experience in protecting and promoting the family as the fundamental unit of society in the United Nations and related international venues. **E. Douglas Clark** is the President of FAI.

Family Watch International was founded in 1999 and is a nonprofit, international organization with members and supporters in over 100 countries. Its mission is to preserve and promote the family, based on marriage between a man and a woman as the societal unit that provides the best outcome for men, women and children. FWI works at the United Nations and in countries around the world educating the public and policymakers regarding the central role of the family and advocating for women, children and families at the international, national, and local level. **Sharon Slater** is the President of FWI.

Freedom Alliance is a non-profit educational and charitable foundation founded in 1990 by Lt. Col Oliver L. North, who now serves as the organization's honorary chairman. Its mission is to advance the American heritage of freedom by honoring and encouraging military service, defending the sovereignty of the United States and promoting a strong national defense. **Thomas P. Kilgannon** is the President of Freedom Alliance.

Hudson Institute is a non-partisan policy research organization dedicated to innovative research and analysis that promotes global security, prosperity, and freedom. The Institute challenges conventional thinking and helps manage strategic transitions to the future through interdisciplinary and collaborative studies in defense, international relations, economics, culture, science, technology, and law. Through publications, conferences and policy recommendations, we seek to guide global leaders in government and business. **Herbert I. London** is President and **John Fonte** is a Senior Fellow at Hudson.

Solidarity Center for Law and Justice is a professional corporation organized under the laws of the State of Georgia for the promotion of social welfare by defending human rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U.S. Constitution or by a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice files briefs as amicus curiae in litigation of importance to the protection of human rights.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in

1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs with the courts. Cato's interest in this particular case lies not in the underlying criminal law issues but in that it could be used as a vehicle for improperly inserting foreign and international law—and non-binding aspirations—into domestic constitutional (and statutory) interpretation. **Ilya Shapiro** is a senior fellow in constitutional studies at Cato and editor-in-chief of the *Cato Supreme Court* Review.

The Competitive Enterprise Institute is a public interest group dedicated to free enterprise and limited government. In its view, the use of vague international norms to interpret constitutional provisions poses grave dangers to liberty. **Christopher C. Horner** is a Senior Fellow at CEI.

The Sovereignty Network was organized to formulate proper courses of action in response to U.S. government policies, federal legislation, and actions of the United Nations system which erode or otherwise impinge on American sovereignty, and takes concerted action to strengthen American independence and self-government by opposing global governance and transnational progressivism. The Network is an association of analysts, activists, and academics based in Washington, DC.

United Families International is a non-profit, non-partisan, non-religious international organization founded in 1979. It is devoted to maintaining and strengthening the family. UFI strengthens the family by respecting existing law, political structure,

religion and cultural norms that preserve the family. Apropos to the present cases, UFI strengthens the family by promoting respect for the sovereign rights of each individual nation as it works in the world community to protect the common good of individual families. **Michael Duff** is the President of UFI.